

DOCKET



SUPREME COURT

OF THE UNITED STATES

No. 11-817

Title: Florida, Petitioner

v.

Clayton Harris

Docketed: December 29, 2011

Lower Ct. Supreme Court of Florida

Case Nos.: (SC08-1871)

Decision Date: April 21, 2011

Rehearing Denied: September 22, 2011

Questions Presented

~~~Date~~~ ~~~~~Proceedings and Orders~~~~~

Dec 21 2011 Petition for a writ of certiorari filed. (Response due January 30, 2012)

Jan 12 2012 Waiver of right of respondent Clayton Harris to respond filed

Jan 24 2012 Motion for leave to file amici brief filed by National Police Canine Association, et al.

Jan 25 2012 DISTRIBUTED for Conference of February 17, 2012.

Jan 30 2012 Brief amicus curiae of Commonwealth of Virginia, et al. filed

Jan 31 2012 Response Requested. (Due March 1, 2012)

Feb 15 2012 Brief of respondent Clayton Harris in opposition filed

Feb 15 2012 Motion for leave to proceed in forma pauperis filed by respondent

Feb 29 2012 DISTRIBUTED for Conference of March 16, 2012.

Mar 19 2012 DISTRIBUTED for Conference of March 23, 2012.

Mar 26 2012 Motion for leave to file amici brief filed by National Police Canine Association, et al.  
GRANTED.

Mar 26 2012 Motion for leave to proceed in forma pauperis filed by respondent GRANTED.

Mar 26 2012 Petition GRANTED.

May 9 2012 The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 11, 2012.

Jun 8 2012 The time to file the joint appendix and petitioner's brief on the merits is further extended to and including June 25, 2012.

Jun 25 2012 Joint appendix filed

Jun 25 2012 Brief of petitioner Florida filed

Jun 27 2012 Brief amici curiae of National Police Canine Association, et al. filed.

Jun 29 2012 Brief amici curiae of Commonwealth of Virginia, et al. filed.

Jul 2 2012 Brief amicus curiae of United States filed.

Jul 11 2012 The time to file respondent's brief on the merits is extended to and including August 24,

2012

Jul 23 2012 SET FOR ARGUMENT ON Wednesday, October 31, 2012

Aug 2 2012 CIRCULATED

Aug 24 2012 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed

Aug 24 2012 Brief of respondent Clayton Harris filed (Distributed)

Aug 30 2012 Brief amicus curiae of Institute for Justice filed (Distributed)

Aug 30 2012 Brief amicus curiae of The Rutherford Institute filed (Distributed)

Aug 31 2012 Brief amicus curiae of EPIC filed (Distributed)

Aug 31 2012 Brief amici curiae of Fourth Amendment Scholars filed (Distributed)

Aug 31 2012 Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed (Distributed)

Sep 24 2012 Reply of petitioner Florida filed (Distributed)

Sep 25 2012 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED

Oct 31 2012 Argued. For petitioner: Gregory G. Garre, Washington, D. C.; and Joseph R. Palmore, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Glen P. Gifford, Assistant Public Defender, Tallahassee, Fla.

---

**PETITION  
FOR  
WRIT OF  
CERTIORARI**

11-817  
No. \_\_\_\_\_

FILED  
DEC 21 2011  
CLERK OF COURT

In the Supreme Court of the United States

---

STATE OF FLORIDA, *Petitioner*,

v.

CLAYTON HARRIS, *Respondent*.

---

On Petition for Writ of Certiorari to the  
Supreme Court of Florida

---

PETITION FOR A WRIT OF CERTIORARI

PAMELA JO BONDI  
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI  
Associate Deputy Attorney General

ROBERT J. KRAUSS\*  
Chief-Assistant Attorney General  
bob.krauss@myfloridalegal.com

SUSAN M. SHANAHAN  
Assistant Attorney General  
Office of the Attorney General  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013  
(813) 287-7900  
Counsel for State of Florida  
\*Counsel of Record

## QUESTION PRESENTED

Whether the Florida Supreme Court has decided an important federal question in a way that conflicts with the established Fourth Amendment precedent of this Court by holding that an alert by a well-trained narcotics detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle?

## TABLE OF CONTENTS

|                                       |    |
|---------------------------------------|----|
| QUESTION PRESENTED .....              | i  |
| TABLE OF CONTENTS.....                | ii |
| TABLE OF AUTHORITIES .....            | iv |
| OPINIONS BELOW .....                  | 1  |
| STATEMENT OF JURISDICTION.....        | 2  |
| CONSTITUTIONAL PROVISIONS INVOLVED .. | 2  |
| STATEMENT OF THE CASE .....           | 4  |
| REASONS FOR GRANTING THE WRIT .....   | 10 |

The decision of the Florida Supreme Court violates the established precedent of this Court that a canine sniff by a well-trained narcotics detection dog is unique and provides probable cause to search a vehicle because it “discloses only the presence or absence of narcotics, a contraband item.” *United States v. Place*, 462 U.S. 696, 707 (1983); *Illinois v. Caballes*, 543 U.S. 405, 410 (2005)..... 10

The Fact That a Dog Has Been Trained and Certified is Sufficient Evidence to Establish Probable Cause to Search a Vehicle. .... 13

|                                                                                                                                                                                                                                         |    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| An Alert to the Residual Odor of Contraband Does Not Undermine the Reliability of a Narcotics Detection Dog or Negate Probable Cause to Search. ....                                                                                    | 18 |
| The Florida Supreme Court has improperly expanded this Court's definition of a well-trained drug dog and misinterpreted the Fourth Amendment's probable cause requirement by placing an excessive evidentiary burden on the State. .... | 30 |
| CONCLUSION.....                                                                                                                                                                                                                         | 37 |

## TABLE OF CONTENTS TO APPENDIX

|                                                                                                                                                                 |             |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| District Court of Appeal, First District, Decision, September 4, 2008, is reported as <i>Harris v. State</i> , 989 So. 2d 1214 (Fla. Dist. Ct. App. 2008) ..... | A-1 - A-2   |
| Florida Supreme Court Opinion, SC08-1871, April 21, 2011, reported as <i>Harris v. State</i> , 71 So.3d 756 (Fla. 2011) .....                                   | A-3 - A-52  |
| Florida Supreme Court Order denying Motion for Rehearing, September 22, 2011 .....                                                                              | A-53 - A-54 |

## TABLE OF AUTHORITIES

### Federal Cases

|                                                                                   |               |
|-----------------------------------------------------------------------------------|---------------|
| <i>Carroll v. United States</i> ,<br>267 U.S. 132 (1925).....                     | 14, 32        |
| <i>Florida v. Royer</i> ,<br>460 U.S. 491 (1983).....                             | 10, 11        |
| <i>Hearn v. Bd. of Pub. Educ.</i> ,<br>191 F.3d 1329 (11th Cir. 1999).....        | 19            |
| <i>Illinois v. Caballes</i> ,<br>543 U.S. 405 (2005).....                         | <i>passim</i> |
| <i>Illinois v. Gates</i> ,<br>462 U.S. 213 (1983).....                            | 25            |
| <i>Illinois v. Rodriguez</i> ,<br>497 U.S. 177 (1990).....                        | 31            |
| <i>Indianapolis v. Edmond</i> ,<br>531 U.S. 32 (2000).....                        | 14            |
| <i>Maryland v. Pringle</i> ,<br>540 U.S. 366 (2003).....                          | 35            |
| <i>Texas v. Brown</i> ,<br>460 U.S. 730 (1983).....                               | 32            |
| <i>United States v. Alvarado</i> ,<br>936 F.2d 573 (6th Cir. 1991) .....          | 16            |
| <i>United States v. Banks</i> ,<br>3 F.3d 399 (11th Cir. 1993) .....              | 16            |
| <i>United States v. Byle</i> ,<br>2011 WL 1983359 (M.D. Fla. Apr. 15, 2011) ..... | 26            |



|                                                                                  |               |
|----------------------------------------------------------------------------------|---------------|
| <i>United States v. Castaneda</i> ,<br>368 Fed. Appx. 859 (10th Cir. 2010) ..... | 14            |
| <i>United States v. Daniel</i> ,<br>982 F.2d 146 (5th Cir. 1993) .....           | 15            |
| <i>United States v. Diaz</i> ,<br>25 F.3d 392 (6th Cir. 1994) .....              | 15, 27        |
| <i>United States v. Gonzalez-Acosta</i> ,<br>989 F.2d 384 (10th Cir. 1993).....  | 16            |
| <i>United States v. Johnson</i> ,<br>660 F.2d 21 (2d Cir. 1981) .....            | 19, 26        |
| <i>United States v. Kitchell</i> ,<br>653 F.3d 1206 (10th Cir. 2011).....        | 25            |
| <i>United States v. Ludwig</i> ,<br>10 F.3d 1523 (10th Cir. 1993).....           | 25            |
| <i>United States v. Ludwig</i> ,<br>641 F.3d 1243 (10th Cir. 2011).....          | 33            |
| <i>United States v. Nelson</i> ,<br>309 F. Appx. 373 (11th Cir. 2009) .....      | 18            |
| <i>United States v. Outlaw</i> ,<br>319 F.3d 701 (5th Cir. 2003) .....           | 16            |
| <i>United States v. Parada</i> ,<br>577 F.3d 1275 (10th Cir. 2009).....          | 15            |
| <i>United States v. Place</i> ,<br>462 U.S. 696 (1983).....                      | <i>passim</i> |
| <i>United States v. Robinson</i> ,<br>390 F.3d 853 (6th Cir. 2004) .....         | 15            |
| <i>United States v. Sanchez-Pena</i> ,<br>336 F.3d 431 (5th Cir. 2003) .....     | 16            |

|                                                                           |    |
|---------------------------------------------------------------------------|----|
| <i>United States v. Sentovich</i> ,<br>677 F.2d 834 (11th Cir. 1982)..... | 15 |
| <i>United States v. Sundby</i> ,<br>186 F.3d 873 (8th Cir. 1999) .....    | 16 |
| <i>United States v. Williams</i> ,<br>69 F.3d 27 (5th Cir. 1994) .....    | 16 |
| <i>United States v. Wood</i> ,<br>915 F. Supp. 1126 (D. Kan. 1996) .....  | 22 |

#### State Cases

|                                                                              |               |
|------------------------------------------------------------------------------|---------------|
| <i>Alvarez v. Commonwealth</i> ,<br>485 S.E.2d 646 (Va. Ct. App. 1997).....  | 17            |
| <i>Dawson v. State</i> ,<br>518 S.E.2d 477 (Ga. Ct. App. 1999).....          | 17            |
| <i>Fitzgerald v. State</i> ,<br>837 A.2d 989 (Md. Ct. Spec. App. 2003) ..... | 22            |
| <i>Gibson v. State</i> ,<br>968 So. 2d 631 (Fla. Dist. Ct. App. 2007).....   | 9             |
| <i>Harris v. State</i> ,<br>71 So. 3d 756 (Fla. 2011) .....                  | <i>passim</i> |
| <i>Harris v. State</i> ,<br>989 So. 2d 1214 (Fla. Dist. Ct. App. 2008).....  | 1, 9          |
| <i>Matheson v. State</i> ,<br>870 So. 2d 8 (Fla. Dist. Ct. App. 2003).....   | <i>passim</i> |
| <i>People v. Clark</i> ,<br>559 N.W.2d 78 (Mich. Ct. App. 1996) .....        | 17            |

|                                                                                              |               |
|----------------------------------------------------------------------------------------------|---------------|
| <i>People v. Stillwell</i> ,<br>129 Cal. Rptr. 3d 233 (Cal. Ct. App. 2011) .....             | 24, 25        |
| <i>State v. Cabral</i> ,<br>159 Md.App. 354, 859 A.2d 285 (Md. Ct.<br>Spec. App. 2004) ..... | 19, 20, 22    |
| <i>State v. Carlson</i> ,<br>657 N.E.2d 591 (Ohio Ct. App. 1995).....                        | 26            |
| <i>State v. Coleman</i> ,<br>911 So. 2d 259 (Fla. Dist. Ct. App. 2005).....                  | 9             |
| <i>State v. Foster</i> ,<br>252 P.3d 292 (Or. 2011) .....                                    | <i>passim</i> |
| <i>State v. Laveroni</i> ,<br>910 So. 2d 333 (Fla. Dist. Ct. App. 2005).....                 | 9             |
| <i>State v. Nguyen</i> ,<br>726 N.W.2d 871 (S.D. 2007) .....                                 | 25            |
| <i>State v. Nguyen</i> ,<br>811 N.E.2d 1180 (Ohio Ct. App. 2004).....                        | 16, 17, 29    |
| <i>State v. Yeoumans</i> ,<br>172 P.3d 1146 (Idaho Ct. App. 2007) .....                      | 17            |
| <i>Wiggs v. State</i> ,<br>72 So. 3d 154 (Fla. Dist. Ct. App. 2011).....                     | 27            |

#### U.S. Supreme Court Rules

|                       |   |
|-----------------------|---|
| Sup. Ct. R. 13.3..... | 2 |
|-----------------------|---|

Constitutional and Statutory Provisions

§ 933.19(1), FLA. STAT. (1979) .....14

28 U.S.C. § 1257(a).....2

Art. I, § 12, FLA. CONST. ....3

U.S. CONST. amend IV.....2

U.S. CONST. amend XIV .....3

Other Authorities

*Robert C. Bird, An Examination of the Training  
and Reliability of the Narcotics Detection Dog,*  
65 Ky. L.J. 405 (1996).....23

No. \_\_\_\_\_

In the Supreme Court of the United States

---

STATE OF FLORIDA, *Petitioner*,

v.

CLAYTON HARRIS, *Respondent*.

---

PETITION FOR A WRIT OF CERTIORARI

---

The State of Florida respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at *Harris v. State*, 71 So. 3d 756 (Fla. 2011). (App. A, *infra*, A3-A52). The Florida Supreme Court denied rehearing, in an unpublished order, on September 22, 2011. (App. A, *infra*, A53-54). The decision of the intermediate appellate court, the District Court of Appeal, First District, is reported at *Harris v. State*, 989 So. 2d 1214 (Fla. Dist. Ct. App. 2008). (App. A, *infra*, A1-A2).

## STATEMENT OF JURISDICTION

The Supreme Court of Florida issued its revised opinion on April 21, 2011. The State filed a motion for rehearing. The Florida Supreme Court denied rehearing on September 22, 2011. *See* Sup. Ct. R. 13.3 (providing: “. . . if a petition for rehearing is timely filed in the lower court by any party . . . , the time to file the petition for a writ of certiorari for all parties. . . runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitutional provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment of the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, § 12 of the Florida Constitution provides in pertinent part:

Searches and seizures. - This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th

Amendment to the United States  
Constitution.

**STATEMENT OF THE CASE**

On routine patrol Deputy Wheatley effectuated a valid stop of the defendant, Clayton Harris, for driving with an expired tag. Upon approaching Harris, the sole occupant of the vehicle, the deputy noticed Harris was visibly nervous, shaking and could not sit still. He further observed an open container of alcohol sitting inside the cup holder. Harris acknowledged his tag was expired and denied the deputy's request to search the vehicle. As the deputy returned to his patrol car to retrieve K-9 Aldo, a narcotics detection dog, he noticed the defendant was moving around the cab of his vehicle and talking on his cell phone. Aldo was deployed around the vehicle and alerted near the driver's door handle.

Harris was asked to exit the vehicle after being advised that the dog's positive alert to the odor of contraband provided the officer with probable cause to search his vehicle. Harris told the deputy that there was nothing illegal in his truck. A search of the vehicle revealed the precursors to making methamphetamine including 200 pseudo/ephedrine pills underneath the driver's seat contained inside a plastic Walgreen's bag



which was wrapped in a shirt. The pills had been dislodged from their foil packets and were loose inside the bag. Harris told the deputy the pills were ephedrine. Beneath the passenger seat the deputy located another plastic bag hidden under clothing which contained eight boxes of matches totaling 8,000 matches. Inside the toolbox the deputy discovered a bottle of muriatic acid, two bottles of antifreeze/water remover and a red Styrofoam plate inside of a green latex glove that contained iodine.

Post-*Miranda*, Harris stated he had driven to three different Walgreens stores and two grocery stores that day to purchase the pseudo/ephedrine pills. Prior to leaving Tallahassee he went to two other stores to buy 8,000 matches and 2 bottles of antifreeze. While driving home he stopped to buy two more boxes of pseudo/ephedrine pills. He admitted to throwing the blister packs from the pills out the window and explained that the coffee filter inside the Styrofoam plate contained iodine crystals. Harris told the officers he had been cooking meth for about one year and had recently made it at his house two weeks prior. He further confessed that he has a big problem with his addiction and he is unable to go more than a few days without using meth.

Harris was charged with unlawfully possessing the chemical pseudo/ephedrine with

reasonable cause to believe it would be used to unlawfully manufacture the controlled substance methamphetamine. At the suppression hearing, Deputy Wheetley testified he has been a canine officer for three years after having completed a 160 hour narcotics detection dog handling course with his previous canine partner through the Dothan Police Department. He had also attended an eight hour course with Florida Department of Law Enforcement (FDLE) on the making of methamphetamine, and was given a list of chemicals or substances used to cook meth. Upon receiving Aldo in 2005, the deputy and Aldo both completed another 40 hour narcotics detection training course. To ensure Aldo's proficiency in detecting narcotics Deputy Wheetley also continually trains with Aldo for four hours every week on various drugs in different environments such as vehicles, buildings and warehouses. The deputy explained that during training on vehicles they would choose multiple vehicles and hide narcotics in some with a few remaining blank (or without contraband). The dogs are taken by blank vehicles to ensure they were not falsely alerting to a vehicle that does not contain the odor of narcotics. Prior to being assigned to Deputy Wheetley, Aldo had also successfully completed a 120 hour narcotics detection course with the Apopka Police Department and had received his

drug certification through Drug Beat in 2004.<sup>1</sup> Deputy Wheetley and Aldo complete a 40 hour narcotics detection "refresher" course every year.

Aldo is a passive alert dog and is trained to sit when he detects the odor of contraband he has been trained to detect. According to the deputy, when Aldo initially gets in the scent cone of the odor of narcotics he gets excited, takes a long sniff, his heart rate will accelerate and his feet will start pattering and he then sits to alert. Aldo has been trained and certified to detect the odor of marijuana, methamphetamine, cocaine, heroin, crack cocaine and ecstasy. According to Deputy Wheetley Aldo's performance in training was "really good" and he was scheduled to be recertified in October 2006. Certification for a single purpose dog, such as Aldo, is not required by the state but the handlers routinely have their dogs certified every year in addition to training. Dual purpose dogs are certified by FDLE in felon

---

<sup>1</sup> Aldo's certificate of successful completion of narcotics detection training in Cannabis, Cocaine, HCI, Cocaine Base, Ecstasy, Heroin and Methamphetamine; and his K-9 Drug Detection Certification in detecting Marijuana, Methamphetamine, Cocaine, Heroine, Crack Cocaine and Ecstasy were admitted into evidence by the State.

tracking or apprehension but there is no requirement that they be certified in narcotics.<sup>2</sup>

Deputy Wheetley also keeps a record of the positive responses Aldo makes in the field and when an arrest is made. Subsequent to his arrest on June 24th in this case, Harris was stopped a few weeks later in the same vehicle for a malfunctioning brake light. Aldo again alerted to the same driver's side area of Harris' vehicle. A search revealed an open bottle of liquor but no drugs. The deputy explained this was not a false alert because Aldo was trained to alert to the odor of narcotics and he will alert to the residual odor of contraband emanating from a vehicle, which he did when he alerted to the driver's side door during the second stop. He stated that Aldo's alert to Harris' vehicle during the second stop was consistent with Harris' previous admissions to often cooking meth at his home, being unable to go more than two days without using meth, his excessive nervousness during the first stop and the fact that his vehicle contained all of the precursors for making meth just a few weeks prior.

The trial court denied the motion to suppress and found there was probable cause to

---

<sup>2</sup> The opinion in *Harris* incorrectly indicates that dual purpose dogs are certified by FDLE in narcotics detection. *Id.* at 767-68.

support a search of the vehicle. The First District Court of Appeal in *Harris v. State*, 989 So. 2d 1214 (Fla. Dist. Ct. App. 2008), affirmed *per curiam* the trial court's order citing *State v. Laveroni*, 910 So. 2d 333 (Fla. Dist. Ct. App. 2005), and *State v. Coleman*, 911 So. 2d 259 (Fla. Dist. Ct. App. 2005), with approval and a contra citation to the opinion in *Gibson v. State*, 968 So. 2d 631 (Fla. Dist. Ct. App. 2007), and *Matheson v. State*, 870 So. 2d 8 (Fla. Dist. Ct. App. 2003).

The Supreme Court of Florida accepted jurisdiction, *Harris v. State*, 71 So. 3d 756 (Fla. 2011), and after briefing and oral argument reversed the opinion of the First District. The Florida Supreme Court held that evidence that a dog has been trained and certified to detect narcotics, standing alone, is insufficient to establish the dog's reliability for purposes of determining probable cause. The court relied heavily upon law review articles and an intermediate appellate court's decision in *Matheson, supra*, which concluded that an officer who knows that his dog is trained and certified can only suspect that a search based on a dog's alert will yield contraband, and mere suspicion cannot justify a search. By holding that a dog alerting to the residual odor of contraband may result in subjecting a person and vehicle to an invasive search when there are no drugs actually present, the *Harris* majority has rejected this Court's interpretation of the Fourth Amendment that a

dog sniff is not a search as it only reveals the presence of contraband. And by requiring the State to demonstrate a level of certainty that goes far beyond that required by the Fourth Amendment or this Court, the Florida Supreme Court has erroneously invalidated the narcotics detection dog as an important crime fighting tool for law enforcement and society.

### REASONS FOR GRANTING THE WRIT

The decision of the Florida Supreme Court violates the established precedent of this Court that a canine sniff by a well-trained narcotics detection dog is unique and provides probable cause to search a vehicle because it “discloses only the presence or absence of narcotics, a contraband item.” *United States v. Place*, 462 U.S. 696, 707 (1983); *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

Almost 30 years ago, after the amendment to the Florida Constitution brought Florida’s search and seizure laws into conformity with all decisions of the United States Supreme Court, that Court rendered its opinion in *Florida v. Royer*, 460 U.S. 491 (1983), observing that “courts are not strangers to the use of trained dogs to detect the presence of controlled substances,” and concluded



that a positive alert by a dog constitutes probable cause. *Id.* at 506.

The *Harris* decision ignores the conclusion of this Court that a canine sniff by a well-trained narcotics detection dog is unique and provides probable cause to search a vehicle because only the presence or absence of narcotics, a contraband item, is disclosed. *United States v. Place*, 462 U.S. 696, 707 (1983). This Court further reaffirmed and explained in *Caballes*, that a dog sniff conducted during a lawful traffic stop that reveals no information other than the location of contraband that no individual has any right to possess, does not violate the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

The Florida Supreme Court's holding in *Harris* is contrary to binding United States Supreme Court precedent and, therefore, passes upon a question of federal law. By concluding that a trained and certified dog, standing alone, does not provide an officer with probable cause to search, and mandating that the State must present extensive evidence to support a probable cause basis for a narcotic detection dog's alert, the Florida Supreme Court in *Harris* ignores the clear precedent of this Court and Fourth Amendment jurisprudence. Courts are forbidden to order the exclusion of evidence as a remedy for an unreasonable search and seizure unless that

remedy is mandated by the federal Constitution as interpreted by the United States Supreme Court.<sup>3</sup>

Contrary to this long established precedent, the *Harris* majority determined that a trained and certified dog does not provide an officer with probable cause to search. "We conclude that when a dog alerts, the fact that the dog has been trained and certified is simply not enough to establish probable cause to search the interior of the vehicle and the person." *Harris*, 71 So. 3d 756 at 767. The Florida Supreme Court further ignored this Court's holding in *Place*, that a dog sniff is not a search because it only reveals the presence of contraband, by opining that a dog alerting to the residual odor of contraband may result in subjecting a person and vehicle to an invasive search when there are no drugs actually present. *Id.* *Harris* has misconstrued this Court's holding in *Place* by improperly declaring that an officer

---

<sup>3</sup> Article I, section 12, of the Florida Constitution requires that its 1982 amendment be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if they would be inadmissible under decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution. Therefore, it is clear the decision in *Harris* does not rest on independent and adequate state grounds but rather presents a question of federal law.



who knows only that his dog is trained and certified, and who has no other information, only has a mere suspicion of criminal activity which cannot justify a search. Such a premise is not only contrary to the holdings of this Court, but is also diametrically opposed to the majority of federal and state law and sets an illogical precedent for the trial courts within its jurisdiction to follow. In its complete disregard of this Court's consistent interpretation of the Fourth Amendment, the Florida Supreme Court has invalidated the usefulness of dogs to law enforcement and society as a crime fighting tool to sniff out illegal contraband. Moreover, the court has invited, and, indeed guaranteed, challenges to K-9's used to track felons and detect explosives.

**The Fact That a Dog Has Been Trained and Certified is Sufficient Evidence to Establish Probable Cause to Search a Vehicle.**

In addressing the issue of drug detection dog sniffs, this Court, in *United States v. Place*, 462 U.S. 696 (1983), found that a "canine sniff" by a well-trained narcotics detection dog is "sui generis," or unique, and is not a search under the Fourth Amendment because it does not unreasonably intrude upon a person's reasonable expectation of privacy, and because "the manner in which information is obtained through this investigative technique is much less intrusive than a typical search." 462 U.S. at 706-07. The

majority opined that a sniff by a canine disclosed only the presence or absence of narcotics, a contraband item; and, therefore, the limited and discriminating nature of a canine sniff did “not constitute a ‘search’ within the meaning of the Fourth Amendment.” *Place*, 462 U.S. at 707. Nor is there a Fourth Amendment requirement of a reasonable, articulable suspicion to justify using a drug detection dog to sniff a vehicle during a legitimate traffic stop. *United States v. Castaneda*, 368 Fed. Appx. 859, 862 (10th Cir. 2010), citing *Illinois v. Caballes*, 543 U.S. 405, 410 (2005), in which this Court held that a sniff by a canine is not a search under the Fourth Amendment because it does not expose noncontraband items that would otherwise remain hidden from public view, and as such does not implicate legitimate privacy interests. *See also Indianapolis v. Edmond*, 531 U.S. 32 (2000) (officers walking narcotics detection dogs around exterior of vehicles at checkpoint did not transform seizure to a search). Additionally, pursuant to the “Carroll doctrine,” codified in Section 933.19(1), Florida Statutes (1979), there is a lesser expectation of privacy associated with automobiles due to their mobility, and if a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more. *Carroll v. United States*, 267 U.S. 132 (1925).

There is clear cut, long-standing authority from the federal courts supporting this premise that an alert by a trained narcotics detection dog provides probable cause, not "mere suspicion." In conformity with this Court's precedent and the Fourth Amendment, every jurisdiction in the country, with the exception of the Florida Supreme Court, has held that an alert by a well-trained and, certified narcotics detection dog provides an officer with probable cause to search. The Eleventh Circuit in *United States v. Sentovich*, 677 F.2d 834 (11th Cir. 1982), found that a showing that a narcotics detection dog is trained satisfies the requirement that drug dogs need to be reliable. The Sixth Circuit in *United States v. Robinson*, 390 F.3d 853 (6th Cir. 2004), held that a positive indication by a certified drug detection canine establishes probable cause, and all other evidence goes to credibility. "A trained narcotic dog's detection of the odor of an illegal substance emanating from a vehicle creates a 'fair probability' that there is contraband in that vehicle." *United States v. Parada*, 577 F.3d 1275, 1282 (10th Cir. 2009).<sup>4</sup> In the Fifth Circuit the

---

<sup>4</sup> See *United States v. Diaz*, 25 F.3d 392 (6th Cir. 1994)(court held training and certification was sufficient but evidence of reliability of dog's performance was admissible and went to "credibility" of dog). In *United States v. Daniel*, 982 F.2d 146 (5th Cir. 1993), the court rejected the argument that an affidavit must show how reliable a drug-detecting dog has been in the past in order to establish probable cause, and in (Continued...)

court stated, "We have repeatedly affirmed that an alert by a drug-detection dog provides probable cause to search. Moreover, in *United States v. Williams*, we held that a showing of the dog's training and reliability is not required if probable cause is developed on site as a result of a dog sniff of a vehicle." *United States v. Sanchez-Pena*, 336 F.3d 431, 444 (5th Cir. 2003).

Nor, does the Florida Supreme Court's opinion that an alert by a trained and certified drug dog only provides an officer with mere suspicion, which is insufficient to establish probable cause, find support among other state jurisdictions. The *Harris* decision is primarily based upon, *Matheson v. State*, 870 So. 2d 8 (Fla. Dist. Ct. App. 2003), an intermediate appellate court opinion which pre-dates *Caballes* and has been expressly disapproved by three other intermediate appellate courts within Florida, as well as several courts in other states. In *State v.*

---

*United States v. Williams*, 69 F.3d 27 (5th Cir. 1994), the court found a dog's alert to luggage, without more, gives probable cause for arrest. See also *United States v. Outlaw*, 319 F.3d 701 (5th Cir. 2003); *United States v. Alvarado*, 936 F.2d 573 (6th Cir. 1991)(the dog's accuracy rate, and therefore its reliability, was considered by the court in the context of a controlled test setting); *United States v. Sundby*, 186 F.3d 873 (8th Cir. 1999); *United States v. Gonzalez-Acosta*, 989 F.2d 384 (10th Cir. 1993); *United States v. Banks*, 3 F.3d 399 (11th Cir. 1993).

*Nguyen*, 811 N.E.2d 1180 (Ohio Ct. App. 2004), the court specifically rejected the holding in *Matheson* that the track record of the dog, with an emphasis on the dog's performance history or amount of "false alerts", must be known in order to conclude that an alert by the dog is sufficiently reliable to furnish probable cause to search. In *State v. Yeoumans*, 172 P.3d 1146 (Idaho App. 2007), the court declined to follow *Matheson* and noted that the Florida appellate court was the only jurisdiction indicating that evidence that a drug dog's alerts to residual odors will preclude the finding of probable cause based on the dog's alert. The Georgia Court of Appeal in *Dawson v. State*, 518 S.E.2d 477 (Ga. Ct. App. 1999), held that evidence of a narcotics detection dog's certification constitutes prima facie evidence of reliability, but that this could be challenged by a defendant with proof of the failure rate of the dog, or other evidence, with the ultimate determination to be made by the trial court. *See also People v. Clark*, 559 N.W.2d 78 (Mich. Ct. App. 1996)(holding canine's alert provided probable cause for warrantless search of vehicle's trunk); *Alvarez v. Commonwealth*, 485 S.E.2d 646 (Va. Ct. App. 1997)(court found probable cause based on positive canine sniff of defendant's package).



**An Alert to the Residual Odor of Contraband Does Not Undermine the Reliability of a Narcotics Detection Dog or Negate Probable Cause to Search.**

In determining reliability, the Florida Supreme Court erroneously focuses on the dog's performance history and how often a dog has alerted in the field without illegal contraband having been found. The majority's premise that in order for a trial court to determine the reliability of an alert it must be able to evaluate a dog's inability to distinguish between residual odor and drugs that are actually present is inherently flawed and demonstrates the *Harris* court's misunderstanding of a well-trained drug dog and the definition of probable cause. "Reliability is generally present if the dog is 'well-trained.'" *United States v. Nelson*, 309 F. Appx. 373, 375 (11th Cir. 2009)(quoting *Caballes*, 543 U.S. at 409).

A dog's superior sense of smell allows it to detect trace amounts and residual odors of a drug that may remain after the odor-emanating drug is no longer present, or that may be carried by any object or a person who had contact with drugs in another location. In the field, when a dog alerts and drugs are not located, there is no way to determine whether the dog alerted to a residual odor or the alert was due to handler error. *State v. Foster*, 252 P.3d 292, 296 (Or. 2011). Only in a controlled environment such as training and

certification can a dog's alert rate be truly gauged. This is not to say the dog's performance records are not useful to a court in determining the dog's reliability but they should not be the sole or main factor in making such a judgment.

Contrary to the assertion of the *Harris* majority, the power of a well-trained narcotics detection dog to alert to the residual odor of contraband increases the possibility that a car contains illegal drugs. *State v. Cabral*, 159 Md.App. 354, 859 A.2d 285, 300 (Md. Ct. Spec. App. 2004)(the fact that a trained dog is capable of detecting odors up to 72 hours after contraband is present in the vehicle only strengthens the probable cause finding due to the dog's superior sense of smell); *accord United States v. Johnson*, 660 F.2d 21, 23 (2d Cir. 1981) (noting the fact that a dog can alert to residual odors "misconstrues the probable cause requirement. Absolute certainty is not required by the Fourth Amendment. What is required is a reasonable belief that a crime has been or is being committed."). Because a person has no reasonable expectation of privacy in odors that emanate from a car in a public place, *Hearn v. Bd. of Pub. Educ.*, 191 F.3d 1329, 1332 (11th Cir. 1999), once a dog alerts to a car probable cause exists to search the car. *Id.* at 1333.

By relying heavily on the misguided opinion in *Matheson* and law review articles for its rationale that due to false alerts in the field and

handler cuing, an alert may not mean drugs were ever present in the vehicle or on the person, the *Harris* majority misunderstands the function of a drug dog. The Fourth Amendment does not require the certainty of success to justify a search for illegal contraband. Contrary to the majority's opinion, even the drug detection dogs used by federal agencies are trained to detect the odor of narcotics and not the presence of contraband. In *State v. Cabral*, 859 A.2d 285 (Md. App. 2004), the court expressly rejected *Matheson* and by implication the conclusions reached by the Florida Supreme Court as follows:

These cases lead us to conclude that Cabral is "barking up the wrong tree." He has confused probable cause with proof beyond a reasonable doubt. If a trained drug dog has the ability to detect the presence of drugs that are no longer physically present in the vehicle or container, but were present perhaps as long as 72 hours prior to the alert, such an ability serves to strengthen the argument that the dog has a superior sense of smell on which to rely to support a finding of probable cause. The possibility that the contraband may no longer be present in the vehicle does not compel the finding that there is no probable cause; for purposes of the probable



cause analysis, we are concerned with probability, not certainty. The issue of a possible alert to a residual odor is a factor to be considered by the trial court, but it is not dispositive.

We are reminded of what Judge Moylan wrote in Fitzgerald, recognizing the reliability of a trained drug dog.

“[T]he instant court sees a positive alert from a law enforcement dog trained and certified to detect narcotics as inherently more reliable than an informant’s tip. Unlike an informant, the canine is trained and certified to perform what is best described as a physical skill. The personal and financial reasons and interest typically behind an informant’s decision to cooperate can hardly be equated with what drives a canine to perform for its trainer. The reliability of an informant is really a matter of forming an opinion on the informant’s credibility either from past experience or from independent corroboration. With a canine,

the reliability should come from the fact that the dog is trained and annually certified to perform a physical skill." *Fitzgerald*, 153 Md. App. at 637, 837 A.2d 989 (quoting *United States v. Wood*, 915 F. Supp. 1126, 1136 n.2 (D. Kan. 1996)(italics omitted).

*State v. Cabral*, 859 A.2d 285, 380-381 (Md. App. 2004).

The Oregon Supreme Court also considered the question of whether probable cause to search a vehicle is undermined because of the possibility that a narcotics detection dog could alert to residual odor. In *State v. Foster, supra*, the defendant claimed that because the dog was unable to determine the difference between a residual odor and the presence of the actual narcotic the dog was inherently too unreliable. Foster relied on the same misleading law review article cited by the *Harris* majority in which the author, based on a phone interview of a single federal agent, inaccurately described the training of federal customs dogs to include differentiating between residual odor and contraband. See *Robert C. Bird, An Examination of the Training and Reliability of the Narcotics Detection Dog*, 65 Ky.

L.J. 405, 414 (1996); *Matheson v. State*, 870 So. 2d 8 (Fla. 2003).<sup>5</sup> The Oregon Supreme Court found no rational basis for the theory that a drug dog's reliability hinged on its ability to distinguish residual odors from actual narcotics and expressly disagreed with the author's observations. *State v. Foster*, 252 P.3d at 298 n.7.

The Oregon court further recognized this argument had been made and rejected by other courts around the country and concluded it was based on a misconception of what probable cause requires, and stated that:

In this context, the possibility that a trained drug-detection dog will alert to a residual odor, rather than the actual presence of drugs, does not *ipso facto* render it unreasonable to believe that drugs or other seizable things are probably present. First, if the dog is properly trained and handled, the likelihood that the dog's alert indicates the presence of an illegal drug remains a substantial one. Second, and significantly, even if the

---

<sup>5</sup> Based upon questions raised during oral argument in *Harris* the Florida Supreme Court was provided with the U.S. Customs training manual indicating their narcotics detection dogs are trained to detect the odor of contraband and not to the presence of the drug.

odor is a residual one only, there is no substantial—let alone equal or greater—likelihood of a purely innocent explanation for the presence of the odor of drugs. Either illegal drugs are present, or something that was in contact with illegal drugs and carries the odor is present. Thus, even when actual drugs are not present, something that carries the odor of the drug (such as drug paraphernalia, a receipt for drug sales, or another item associated with drug use or drug distribution) likely is present and may be seizable, even if it is not the drug itself. For those reasons, we conclude that probable cause to search may arise from the alert of a trained drug-detection dog despite the *possibility* that the alert is to a residual odor of an illegal drug rather than an odor emanating from the actual drug.

*State v. Foster*, 252 P.3d. at 299-300.

For example, California courts do not require evidence of a dog's success rate in the field to establish probable cause. *See People v. Stillwell*, 129 Cal. Rptr. 3d 233 (Cal. Ct. App. 2011). In declining to follow the flawed reasoning in *Matheson* and *Harris* the *Stillwell* court held that, "California authority does not support the

notion that more than an alert from a trained narcotics detection dog is needed to establish probable cause.” *Id.* at 239. The court likewise disagreed with the assertion made in *Harris* and *Matheson* that the alert of even a well-trained detection dog, standing alone, cannot establish probable cause for a search, as “[p]robable cause is established where ‘there is a fair probability that contraband or evidence of a crime will be found in a particular place.’” *People v. Stillwell*, 129 Cal. Rptr. 3d at 240, *quoting Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527, 548 (1983). “[A] dog alert usually is at least as reliable as many other sources of probable cause and is certainly reliable enough to create a ‘fair probability’ that there is contraband.” *United States v. Kitchell*, 653 F.3d 1206, 1223 (10th Cir. 2011), *quoting United States v. Ludwig*, 10 F.3d 1523, 1527 (10th Cir. 1993).

To be sure, field activity reports may be considered, but relying on them “solely or excessively” to determine the reliability of a narcotics detection dog belies the entire concept of training dogs to use their superior sense of smell. Field activity reports should not be the full measure or even the most meaningful gauge of a dog’s reliability. *State v. Nguyen*, 726 N.W.2d 871 (S.D. 2007). Dogs are not trained to detect the actual presence of contraband but to detect the odor of narcotics. Because odor travels with wind and air currents the details regarding the location

of the cocaine compared to the alert is not telling. The smell of drugs located in a center console might result in the dog alerting to the trunk if the vehicle had just been traveling down the highway with the odor circulating from the front of the car to the rear. *See United States v. Byle*, 2011 WL 1983359, \*7 (M.D. Fla. Apr. 15, 2011)(finding that defendant's speculation as to area that emitted strongest odor does not discredit the drug dog's correct response). *But cf. Harris*, 71 So. 3d at 774 (Aldo's alert to the door handle standing alone, provides no basis for an objective probable cause determination that drugs were present inside the vehicle).

The correct probable cause standard was applied to drug dogs in *State v. Carlson*, 657 N.E.2d 591, 600 (Ohio Ct. App. 1995), as the court observed that:

Appellant's argument with respect to the problem of a dog detecting only the residual odors as opposed to the drugs themselves misconstrues the probable cause requirement. Absolute certainty is not required by the Fourth Amendment. What is required is a reasonable belief that a crime has been or is being committed.

(quoting *United States v. Johnson*, 660 F.2d 21, 22-23 (2d Cir. 1981).



In essence, the *Harris* majority has created a standard that cannot be met by any properly trained and certified canine. To require a drug dog to distinguish between the odor of narcotics and the actual drug is likely impossible, and goes against the very foundation of the probable cause standard. Very likely, a canine's human officer cannot be trained to tell whether the odor of marijuana he smells upon approaching a vehicle is from a blunt still burning or one smoked hours ago. Whether smelled by a human or canine officer, the odor of illegal drugs emanating from a vehicle provides law enforcement with probable cause to search and any failure to locate actual narcotics inside the vehicle does not negate the search or the probable cause from which it originated. *See United States v. Diaz*, 25 F.3d 392 (6th Cir. 1994)(holding it unnecessary to provide drug dog's training and performance records, just as it is similarly unnecessary to qualify a human expert this way in admitting evidence of dog's alert to smell of contraband).

Florida's Second District Court Judge Altenbernd aptly observed in *Wiggs v. State*, 72 So. 3d 154 (Fla. Dist. Ct. App. 2011) that:

...in fairness to Zuul, his strength is also his weakness. It seems obvious that Zuul is alerting on residual drugs that do not lead to the discovery of arrestable quantities of drugs. It is

not that Zuul is alerting when there are no drugs to smell; he is alerting to molecules of drugs left behind in vehicles where drugs have been used or transported. Thus, in *Harris*, the court is requiring that law enforcement train dogs to distinguish between the odor of minute quantities of drugs and larger quantities of drugs. If that cannot be done for a particular drug, it seems we will need to abandon dogs as a method of obtaining probable cause for that drug.

In the present case there is no indication that Aldo gave a false indication for the presence of narcotics when he alerted in the present stop. And on any occasion in which he was deployed in the field, there were only instances of "unverified alerts" in which narcotics were not located. The record supports a finding Aldo was well-trained pursuant to *Place* and *Caballes*. As previously explained, a failure to find narcotics does not negate the alert or the probable cause it provided because narcotics detection dogs are trained to detect the odor of narcotics and can detect residual amounts of contraband. Therefore, a drug dog's alert provides probable cause in multiple situations in which no drugs are found but the



odor of contraband is detected by the dog.<sup>6</sup> Using the construct of the Florida Supreme Court, a well-trained narcotics detection dog would be considered unreliable even though the dog properly alerted to the odor of illegal drugs.

Disregarding United States Supreme Court precedent and a reasonable interpretation of probable cause, the Florida Supreme Court has created an impossible standard for probable cause by requiring absolute certainty drugs will be found, and by directing that a narcotics detection dog be able to distinguish between residual odor and actual drugs. The Florida Supreme Court also failed to acknowledge or distinguish recent well-reasoned decisions from several intermediate appellate courts within Florida and other state and federal jurisdictions throughout the country which have clearly rejected these impossible and unnecessary additions to a "probable cause analysis." As held in *State v. Nguyen*, 811 N.E.2d 1180, 1188 (Ohio Ct. App. 2004), "Federal courts

---

<sup>6</sup> Often, passengers of a vehicle have been in the presence of illegal drugs or where narcotics had been used at some point in or around a vehicle and the odor remains. There is also the possibility the driver has contraband on his person but after the dog alerts and the driver exits the vehicle for purposes of the search no drugs are discovered because the driver cannot be searched. Drugs may also be so cleverly hidden within on a vehicle that after an alert the officers are unable to locate the contraband.

tend to follow the national trend, which states that a drug dog's training and certification records can be used to uphold a finding of probable cause to search and can be used to show reliability, if required, but that canine reliability does not always need to be shown by real world records."

**The Florida Supreme Court has improperly expanded this Court's definition of a well-trained drug dog and misinterpreted the Fourth Amendment's probable cause requirement by placing an excessive evidentiary burden on the State.**

While the *Harris* majority, in a footnote, acknowledged this Court has already provided a definition for a "well-trained" drug dog in *Place* and *Caballes* as one that does not alert to non-contraband items, the Florida Supreme Court ignored this Court's holding that probable cause is provided by the alert of a well-trained dog. *Harris*, 71 So. 3d 766, n.6. The majority not only disregarded this Court's holding that probable cause is provided by the alert of a well-trained dog, it twisted probable cause into an impractical and inflexible concept by requiring the State's burden of proof to include an elaborate set of factors. Today, in Florida, the Florida Supreme Court has rewritten the governing probable cause standard and elevated the level of proof far beyond that demanded by any authoritative decision. Today, the State, in order to demonstrate that an officer

has a reasonable basis for believing that an alert by a narcotics detection dog is reliable to provide probable cause to search, must present evidence of the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability, regardless of whether any questions are raised as to the dog's abilities.

In *Harris*, Justice Canady succinctly articulated his disapproval of the majority's handiwork in his dissenting opinion finding that, "[i]n establishing requirements for determining the lawfulness of a search based on the alert of a drug detection dog, the majority demands a level of certainty that goes beyond what is required by the governing probable cause standard." *Harris*, 71 So. 3d at 775 (Canady, C.J., dissenting). In order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by a police officer conducting a search under an exception to the warrant requirement - is not that they always be correct, but that they always be reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990). "Probable cause is a flexible, common-sense standard. It merely requires that the facts available to the

officer would 'warrant a man of reasonable caution in the belief' that certain items may be contraband...; it does not demand any showing that such a belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983), *quoting Carroll v. United States*, 267 U.S. 132, 162 (1925).

Disregarding precedent and a reasonable interpretation of probable cause, the majority has created a new standard for probable cause by determining that the fact that a dog has been trained and certified, standing alone, provides the officer only with mere suspicion which cannot justify a search. The *Harris* majority further misconstrues the probable cause analysis by imposing "evidentiary requirements which can readily be employed to ensure that the police rely on drug detection dogs only when the dogs are shown to be virtually infallible." *Harris*, 71 So. 3d at 775 (Canady, C.J., dissenting).

The Florida Supreme Court has established that it is the State's burden to prove the dog's reliability and it must introduce extensive evidence for the trial court to adequately undertake an objective evaluation of the officer's belief in the dog's reliability as a predicate for determining probable cause. The trial court would in essence be required to conduct a mini-trial regarding a dog's qualifications in every drug case in which probable cause was based on an alert,

even if reliability of the dog went unchallenged by the defense. This impractical approach also requires the judiciary to determine a particular dog's prowess as a detector of narcotics. However, as noted in *United States v. Ludwig*, 641 F.3d 1243, 1251 (10th Cir. 2011):

... it is safe to assume that canine professionals are better equipped than judges to say whether an individual dog is up to snuff. And beyond this, a dog's credentials provide a bright-line rule for when officers may rely on the dog's alerts – a far improvement over requiring them to guess whether the dog's performance will survive judicial scrutiny after the fact.

It reasons then that canine handlers and professionals are better qualified than law journalists who speculate on the criteria necessary to establish the reliability of drug detection dogs.

The state supreme court of Oregon was urged to adopt a four factor probable cause test similar to the one set forth by the *Harris* majority which required evidence of the dog handler team's (1) training regimen; (2) certification program; (3) maintenance regimen; and (4) field performance records. *State v. Foster*, 252 P.3d 292 (Or. 2011). In declining to impose such a hypertechnical standard, the Oregon Supreme



Court noted that, “as for any other probable cause analysis, the assessment is not limited to a fixed list of factors, but instead turns on the information known to officers in relying on a drug-detection dog’s alert, and that, “articulating a static list of factors is unnecessary; the existing probable cause analysis provides ample structure to guide the inquiry.” *Id.* at 298, n.4.

The overly rigid test set forth by the *Harris* majority and expressly rejected by the State of Oregon is inconsistent with the totality of the circumstances approach it claims to have imposed, and misconstrues a reasonable interpretation of probable cause correctly rejected by other courts. “In its effort to manage the conduct of law enforcement, the majority strays beyond what is necessary to determine if the Fourth Amendment’s proscription of ‘unreasonable searches and seizures’ has been violated.” *Harris*, 71 So. 3d at 775 (Canady, C.J., dissenting).

By placing an excessive evidentiary burden on the State, the Florida Supreme Court has misinterpreted the Fourth Amendment’s probable cause requirement and improperly expanded this Court’s long-established precedent regarding the definition of a well-trained drug dog. The *Harris* majority has also contorted “probable cause” into an impractical and inflexible concept requiring the State to satisfy a “virtually infallible” burden of

proof to include an elaborate and almost unobtainable set of factors.

The use of a narcotics detection dog is predicated upon the dog's unique sense of smell and enhanced ability to detect the odor of contraband. Through its misinterpretation of the Fourth Amendment's probable cause requirement and by improperly expanding the definition of a well-trained drug dog, as set forth in *Place* and *Caballes*, the Florida Supreme Court has failed to follow controlling United States Supreme Court decisions articulating the criteria needed to assess whether probable cause exists.

Moreover, the expanded interpretation found herein violates the proper understanding of probable cause as a "practical, non-technical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" See *Maryland v. Pringle*, 540 U.S. 366, 370 (2003).

Whether law enforcement uses a dog for narcotics detection, explosives detection, victim location or suspect tracking, its use is predicated upon a dogs' enhanced ability to detect odor. By misconstruing the rationale behind this Court's controlling precedent in *Place* and *Caballes*, the Florida Supreme Court has virtually negated the use of dogs as a valuable crime fighting tool to law



enforcement and to society. The opinion in *Harris* improperly abrogates the value a narcotics detection dog is to the citizens it serves. In order to prevent this conflict from further eroding this Honorable Court's decisions, that an alert by a well-trained drug detection dog provides probable cause to search a vehicle, this Court should grant certiorari and reverse the decision of the Supreme Court of Florida.

## CONCLUSION

For the foregoing reasons, the State of Florida respectfully requests this Court to grant the Petition for Writ of Certiorari and summarily reverse the findings of the Florida Supreme Court due to contrary and compelling precedent established by this Court in *Caballes and Place* or, in the alternative, grant the Petition for Writ of Certiorari.

Respectfully submitted,

PAMELA JO BONDI  
Attorney General of Florida

ROBERT J. KRAUSS\*  
Chief-Assistant Attorney General  
bob.krauss@myfloridalegal.com

Susan M. Shanahan  
Assistant Attorney General

Office of the Attorney General  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013  
(813) 287-7900

Counsel for State of Florida  
*\*Counsel of Record*

No. \_\_\_\_\_

In the Supreme Court of the United States

---

STATE OF FLORIDA, *Petitioner*,

v.

CLAYTON HARRIS, *Respondent*.

---

On Petition for Writ of Certiorari to the  
Supreme Court of Florida

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI BY  
PETITIONER STATE OF FLORIDA

PAMELA JO BONDI  
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI  
Associate Deputy Attorney General  
ROBERT J. KRAUSS\*

Chief-Assistant Attorney General  
bob.krauss@myfloridalegal.com

SUSAN M. SHANAHAN  
Assistant Attorney General  
Office of the Attorney General  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013  
(813) 287-7900

Counsel for State of Florida

\*Counsel of Record

## TABLE OF CONTENTS TO APPENDIX

District Court of Appeal, First District,  
Decision, September 4, 2008, reported as  
*Harris v. State*, 989 So. 2d 1214 (Fla. Dist. Ct. App.  
2008) ..... A-1 - A-2

Florida Supreme Court Opinion, SC08-1871,  
April 21, 2011, reported as *Harris v. State*, 71  
So.3d 756 (Fla. 2011) ..... A-3 - A-52

Florida Supreme Court Order denying Motion for  
Rehearing, September 22, 2011 ..... A-53 - A-54

IN THE DISTRICT  
COURT OF APPEAL  
FIRST DISTRICT,  
STATE OF FLORIDA

CLAYTON HARRIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL  
TIME EXPIRES TO FILE  
MOTION FOR  
REHEARING AND  
DISPOSITION  
THEREOF IF FILED

CASE NO. 1D06-6497

---

Opinion filed September 4, 2008

An appeal from the Circuit Court for Liberty  
County.

L. Ralph Smith, Jr., Judge.

Nancy A. Daniels, Public Defender, and Judith  
Hall and G. P. Gifford, Assistant Public Defenders,  
Tallahassee, for Appellant.

Bill McCollum, Attorney General, and Philip W.  
Edwards and Natalie D. Kirk, Assistant Attorneys  
General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED. See State v. Laveroni, 910 So.2d 333 (Fla. 4<sup>th</sup> DCA 2005); State v. Coleman, 911 So.2d 259 (Fla. 5<sup>th</sup> DCA 2005). Contra Gibson v. State, 968 So.2d 631 (Fla. 2d DCA 2007) (following Matheson v. State, 870 So.2d 8 (Fla. 2d DCA 2003)).

DAVIS, VAN NORTWICK, AND POLSTON, JJ.,  
CONCUR.

Supreme Court of Florida

No. SC08-1871.

CLAYTON HARRIS,  
Petitioner,

vs.

STATE OF FLORIDA,  
Respondent.

[April 21, 2011]  
REVISED OPINION

PARIENTE, J.

When will a drug-detection dog's alert to the exterior of a vehicle provide an officer with probable cause to conduct a warrantless search of the interior of the vehicle? That is the question in this case, and the answer is integral to the constitutional right of all individuals in this state to be protected from unreasonable searches and seizures.<sup>FN1</sup>

FN1. The issue in this case is *not* whether a dog's sniff of the exterior of a vehicle constitutes a search. That has been answered by the United States Supreme Court. See *Illinois v. Caballes*, 543 U.S. 405,



407–08, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) (holding that a canine sniff of an automobile need not be justified by reasonable articulable suspicion of drug activity); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) (recognizing that a canine sniff of an automobile is not a search); *see also United States v. Place*, 462 U.S. 696, 706–07, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (holding that a canine sniff of luggage does not constitute a search).

The issue of when a dog's alert provides probable cause for a search hinges on the dog's reliability as a detector of illegal substances within the vehicle. We hold that the State may establish probable cause by demonstrating that the officer had a reasonable basis for believing the dog to be reliable based on the totality of the circumstances. Because a dog cannot be cross-examined like a police officer on the scene whose observations often provide the basis for probable cause to search a vehicle, the State must introduce evidence concerning the dog's reliability. In this case, we specifically address the question of what evidence the State must introduce in order to establish the reasonableness of the officer's belief—in other words, what evidence must be introduced in order for the trial court to adequately undertake an objective evaluation of the officer's belief \*759 in the dog's reliability as a predicate for determining probable cause.

The appellate courts addressing the issue in this state have differed on what evidence the State must present to meet its burden. The decision of the First District Court of Appeal in *Harris v. State*, 989 So.2d 1214 (Fla. 1st DCA 2008), expressly and directly conflicts with the decisions of the Second District Court of Appeal in *Gibson v. State*, 968 So.2d 631 (Fla. 2d DCA 2007), and *Matheson v. State*, 870 So.2d 8 (Fla. 2d DCA 2003).<sup>FN2</sup> In *Harris*, the First District without elaboration cited *State v. Laveroni*, 910 So.2d 333 (Fla. 4th DCA 2005), and *State v. Coleman*, 911 So.2d 259 (Fla. 5th DCA 2005), as authority in support of affirming the trial court, which upheld the search at issue. The First District also cited *Gibson*, which followed *Matheson*, as contradictory authority.

FN2. We have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const.

The reliability of a dog as a detector of illegal substances is subject to a totality of the circumstances analysis. Thus, the trial court must be presented with the evidence necessary to make an adequate determination as to the dog's reliability. For the reasons explained below, we hold that evidence that the dog has been trained and certified to detect narcotics, standing alone, is not sufficient to establish the dog's reliability for purposes of determining probable cause—especially since training and certification in this state are not standardized and thus each training

and certification program may differ with no meaningful way to assess them.

Accordingly, we conclude that to meet its burden of establishing that the officer had a reasonable basis for believing the dog to be reliable in order to establish probable cause, the State must present the training and certification records, an explanation of the meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability in being able to detect the presence of illegal substances within the vehicle. To adopt the contrary view that the burden is on the defendant to present evidence of the factors other than certification and training in order to demonstrate that the dog is unreliable would be contrary to the well-established proposition that the burden is on the State to establish probable cause for a warrantless search. In addition, since all of the records and evidence are in the possession of the State, to shift the burden to the defendant to produce evidence of the dog's unreliability is unwarranted and unduly burdensome. Accordingly, we quash *Harris* and disapprove *Coleman* and *Laveroni*. We approve *Gibson* and *Matheson* to the extent they are consistent with this opinion.

## FACTS

In July 2006, the State charged Clayton Harris with possession of the listed chemical pseudoephedrine with intent to use it to manufacture methamphetamine, more commonly known as meth, in violation of section 893.149(1)(a), Florida Statutes (2006). Harris subsequently moved to suppress seized evidence, including the pseudoephedrine, arguing that it was found pursuant to an illegal search of his truck.

At the hearing on the motion to suppress, the evidence established that on June 24, 2006, Liberty County Sheriff's Canine Officer William Wheatley and his drug-detection dog, Aldo, were on patrol. Officer Wheatley conducted a traffic stop of Harris's truck after confirming that \*760 Harris's tag was expired. Upon approaching the truck, Officer Wheatley noticed that Harris was shaking, breathing rapidly, and could not sit still. Officer Wheatley also noticed an open beer can in the cup holder. When Officer Wheatley asked for consent to search the truck, Harris refused. Officer Wheatley then deployed Aldo. Upon conducting a "free air sniff" of the exterior of the truck, Aldo alerted to the door handle of the driver's side.

Underneath the driver's seat, Officer Wheatley discovered over 200 pseudoephedrine pills in a plastic bag wrapped in a shirt. On the passenger's side, Officer Wheatley discovered eight boxes of matches containing a total of 8000 matches. Officer Wheatley then placed Harris under arrest. A subsequent search of a toolbox on the passenger

side revealed muriatic acid. Officer Wheatley testified that these chemicals are precursors of methamphetamine. After being read his *Miranda*<sup>FN3</sup> rights, Harris stated that he had been cooking meth for about one year and most recently cooked it at his home in Blountstown two weeks prior to the stop. Harris also admitted to being addicted to meth and needing it at least every few days.

FN3. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

As of the day that Officer Wheatley searched Harris's truck, Officer Wheatley had been a law enforcement officer for three years and had been a canine handler since 2004. In January 2004, Aldo completed a 120-hour drug detection training course at the Apopka Police Department with his handler at the time, Deputy Sherriff William Morris. In February 2004, Aldo was certified with Morris as a drug-detection dog by Drug Beat K-9 Certifications. Aldo is trained and certified to detect cannabis, cocaine, ecstasy, heroin, and methamphetamine. Aldo is not trained to detect alcohol or pseudoephedrine. Although Officer Wheatley testified that pseudoephedrine is a precursor of meth, there was no testimony on whether a dog trained to detect and alert to meth would also detect and alert to pseudoephedrine.

In July 2005, Aldo and Officer Wheatley became partners. In February 2006, they completed a



forty-hour training seminar with the Dothan Police Department. Officer Wheatley testified that he and Aldo complete this seminar annually. Additionally, Officer Wheatley trains Aldo four hours per week in detecting drugs in vehicles, buildings, and warehouses. For example, Officer Wheatley may take Aldo to a wrecker yard and plant drugs in six to eight out of ten vehicles. Officer Wheatley then takes Aldo and performs a "W pattern, up, down, up, down."

Aldo must alert to the vehicles with drugs, and he is rewarded for an accurate alert. Officer Wheatley described Aldo's success rate during training as "really good." Aldo's training records, which Officer Wheatley began keeping in November 2005, were introduced in evidence. These records reveal that on a performance level of either satisfactory or unsatisfactory, Aldo performed satisfactory 100% of the time. However, Officer Wheatley did not explain whether a satisfactory performance includes any alerts to vehicles where drugs were not placed.

Officer Wheatley also testified that in Florida a single-purpose dog, such as one trained only to detect drugs, is not required by law to carry certification. These dogs are required to show proficiency only in locating drugs. By contrast, a dual-purpose dog, such as one trained in apprehension and drug detection, must carry Florida Department of Law Enforcement (FDLE) certification. Florida does not \*761 have a set

standard for certification for single-purpose drug dogs, such as Aldo.

With regard to Aldo's performance in the field, Officer Wheatley testified that he deploys Aldo approximately five times per month. Officer Wheatley maintains records of Aldo's field performance only when Officer Wheatley makes an arrest. Officer Wheatley testified that he does not keep records of Aldo's alerts in the field when no contraband is found; he documents only Aldo's successes. These records were neither produced prior to the hearing nor introduced at the hearing.<sup>FN4</sup> Thus, it is impossible to determine what percentage of time Aldo alerted and no contraband was found following a warrantless search of the vehicle.

FN4. At the hearing, defense counsel argued that the State withheld discovery by failing to produce these records. The State responded that it provided everything it had. Officer Wheatley stated that when the defense asked him to produce the records and certification, he believed the defense was referring to Aldo's training and certification, not field performance records. The trial court did not find a discovery violation. Harris does not challenge that ruling in this review proceeding.

Harris introduced evidence of a specific instance of Aldo's field performance to support his



position that Aldo is unreliable involving this same vehicle and same defendant. About two months after the June 24 stop, Officer Wheatley stopped Harris again for a traffic infraction.<sup>FN5</sup> On this stop, Officer Wheatley again deployed Aldo, who alerted to the same driver's side door handle. A subsequent search of the truck revealed only an open bottle of liquor and no illegal substances.

FN5. here was testimony that this stop occurred within four to six weeks before the suppression hearing on October 12, 2006, which means that the stop occurred between late August and mid-September 2006.

Officer Wheatley testified to the issue of residual odors. According to Officer Wheatley, Aldo can pick up residual odors of illegal drugs on an object when, for example, someone has the odor on his or her hand and touches a door handle. When asked how long a residual odor can remain on the handle, Officer Wheatley stated that he was not qualified to answer that question.

Regarding the alert in this case, Officer Wheatley testified that Aldo presumably alerted to residual odor of meth on the door handle, indicating that Officer Wheatley did not believe that Aldo alerted to any of the substances found in the vehicle. Officer Wheatley testified on cross-examination:

Officer Wheetley: [W]hen my dog alerts to a door handle, it usually means, in the cases which I have worked in the past, that somebody has either touched the narcotics or have smoked narcotics, the odor is on their hand when they touched the door handle is when the odor transfer occurs. And that's when my dog will pick up on the residual odor of the narcotics.

Defense Counsel: So you have no idea—do you know how long ago somebody might have touched that vehicle?

Officer Wheetley: Ma'am, you're asking me a question for an expert. I don't feel comfortable answering that.

Defense Counsel: Do you know whether it could have been someone other than the person driving the vehicle?

Officer Wheetley: I can't answer that question, ma'am....

....

Officer Wheetley: The residual odor is there. That's what caused my dog to show the response. So if it's there, my dog responded to the odor, so which—apparently the odor was there.

\*762 Defense Counsel: But you have no way of establishing in this case that this is not just a false alert by your dog?

Officer Wheatley: Ma'am, we found the precursors to methamphetamine, all the listed chemicals were in the truck. He admitted not being able to go more than two days without using. I think that pretty much places the odor on the door handle.

Defense Counsel: The dog, however, did not alert to any of the things he has been trained to alert to as far as your knowledge?

Officer Wheatley: Ma'am, he was trained to alert to the odor of narcotics, which he alerted to the odor of narcotics on the door handle.

After both parties rested, the State argued that Officer Wheatley had probable cause based on the totality of the circumstances, which included the expired tag, open container, nervousness, and an alert by a trained and certified drug-detection dog. In challenging the issue of probable cause, the defense argued that the State failed to establish Aldo's reliability. According to the defense, any dog can be trained, but what matters most is that the dog obtains positive results in the field. The defense focused on the fact that on two occasions (once on June 24, the stop at issue, and once after the stop at issue) Aldo alerted to Harris's truck

and no drugs were found that Aldo was trained to detect.

In an oral ruling, the trial court denied the motion to suppress, found that there was probable cause to search Harris's truck, and admitted the physical evidence seized. The trial court did not make a finding as to the dog's reliability or any other factual findings.

Harris then entered a plea of no contest, reserving the right to appeal the denial of the motion. He was sentenced to twenty-four months' incarceration and five years of probation. On appeal, the First District affirmed. Harris subsequently petitioned this Court for discretionary review, which we accepted based on express and direct conflict between the First and Second Districts.

## THE CONFLICT ISSUE

The question presented to the First District—and now to this Court—concerns the evidence that the State must introduce to establish that probable cause existed for the warrantless search of a vehicle based on a drug-detection dog's alert to the vehicle. To clarify the conflict, we will outline the approaches adopted by the First, Second, Fourth, and Fifth District Courts of Appeal, which have all addressed this issue.

The First, Fourth, and Fifth Districts agree that the State can establish probable cause to search a vehicle by demonstrating that a dog is properly trained and certified to detect illegal drugs. *See Harris*, 989 So.2d at 1215; *Laveroni*, 910 So.2d at 336; *Coleman*, 911 So.2d at 261. None of the courts address what would constitute "proper training and certification," nor do they address the fact that there is no statewide certification for single-purpose drug-detection dogs. These districts do not consider field performance records to be irrelevant; their position is that if the defendant wishes to challenge the reliability of the dog, it is the defendant's burden to introduce field performance records of the dog or other evidence, such as expert testimony.

In *Laveroni*, the defendant moved to suppress illegal drugs found pursuant to a warrantless search of his car. 910 So.2d at 334. The illegal drugs were found after the defendant was stopped for reckless driving and a drug-detection dog alerted to the driver's open window. *Id.* The trial court, on its own and after the parties \*763 rested, "raised the issue of whether there was sufficient proof that the narcotics dog was qualified so as to establish probable cause." *Id.* Because there was no evidence presented as to the dog's qualifications, the trial court granted the motion to suppress. *Id.* at 335. The Fourth District reversed and remanded because the State was not put on notice that the dog's qualifications would be at

issue. *Id.* In the event that the issue would be raised on remand, the Fourth District explained:

[T]he state can make a prima facie showing of probable cause based on a narcotic dog's alert by demonstrating that the dog has been properly trained and certified. If the defendant wishes to challenge the reliability of the dog, he can do so by using the performance records of the dog, or other evidence, such as expert testimony.

*Id.* at 336. The court found support in *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir.1994), which held that evidence of training and certification was sufficient to establish probable cause but that evidence of the reliability of the dog's performance was also admissible to rebut the State's prima facie showing of reliability. *Laveroni*, 910 So.2d at 336.

In *Coleman*, the State challenged the trial court's orders granting motions to suppress drugs found in vehicles after a drug-detection dog's alert indicated that drugs were present in the vehicles. 911 So.2d at 260. Although the State had introduced evidence that the dog had been trained and certified to detect illegal drugs, the State failed to produce evidence of the dog's field performance records. *Id.* The trial court concluded that without evidence of the dog's field performance, the State failed to establish probable cause. *Id.* Relying on *Laveroni*, the Fifth District reversed and held that "the State made a prima



facie showing of probable cause" by introducing evidence that the dog was trained and certified to detect illegal drugs. *Coleman*, 911 So.2d at 261. Accordingly, the court held that "it was error to grant the motions to suppress." *Id.* In *Harris*, citing to *Laveroni* and *Coleman*, the First District aligned itself with the Fourth and Fifth Districts. *Harris*, 989 So.2d at 1215.

The Second District has reached the opposite conclusion on similar facts. According to the Second District, in *Matheson*, 870 So.2d at 14, "the fact that a dog has been trained and certified, standing alone, is insufficient to give officers probable cause to search based on the dog's alert." The Second District reasoned that "[a]n officer who knows only that his dog is trained and certified, and who has no other information, at most can only suspect that a search based on the dog's alert will yield contraband. Of course, mere suspicion cannot justify a search." *Id.* at 13. Thus, the Second District concluded that "the most telling indicator of what the dog's behavior means is the dog's past performance in the field." *Id.* at 15.

The Second District also discussed the issue of residual odors:

[I]n this case Razor's trainer acknowledged the tendency of narcotics detection dogs to alert on the residual odors of drugs that are no longer present.



This underscores one of three central reasons why the fact that a dog has been trained, standing alone, is not enough to give an officer probable cause to search based on the dog's alert. Razor's trainer acknowledged that a trained dog, doing what he has been conditioned to do, imparts to the officer merely that he detects the odor of contraband. To be sure, as the trainer maintained, this may not be a false alert when assessing the success of the dog's conditioning. But for Fourth Amendment purposes it is neither false nor positive. The presence of a drug's odor at an intensity detectable\*764 by the dog, but not by the officer, does not mean that the drug itself is present.

*Id.* at 13. The Second District then enunciated concerns with relying solely on evidence that the dog was trained or "conditioned" to respond in particular ways to particular stimuli:

Although we commonly refer to the "training" of dogs, manifestly they are not trained in the sense that human beings may be trained. It is not a process of imparting knowledge and skills that dogs want or need. However much we dog lovers may tend to anthropomorphize their behavior, the fact is that dogs are not motivated to acquire skills that will assist them in their chosen profession of detecting contraband. Rather, dogs are "conditioned," that is, they are induced to respond in particular ways to particular stimuli. For law enforcement purposes, the ideal

conditioning would yield a dog who always responds to specified stimuli in a consistent and recognizable way, yet never responds in that manner absent the stimuli. But this does not happen. While dogs are not motivated in ways that humans are, neither can they be calibrated to achieve mechanically consistent results.

*Id.* at 13–14.

In this regard, the Second District highlighted that “conditioning and certification programs vary widely in their methods, elements, and tolerances of failure.” *Id.* at 14. The Second District then contrasted the highly rigorous training and certification program of the United States Customs Service to the training in *Matheson*, where the dog and handler had undergone only one initial thirty-day certification program and one week-long annual recertification. *See id.* Finally, the Second District noted that dogs themselves “vary in their abilities to accept, retain, or abide by their conditioning in widely varying environments.” *Id.* In rejecting the proposition that evidence of training and certification alone is sufficient to give probable cause to search based on the dog's alert, the Second District held that multiple factors should be considered, including the exact training received, the criteria for selecting the dogs in the program, the standards the dog was required to meet to successfully complete the training program, and the “track record” of the dog in the field, with an emphasis on the number of mistakes

the dog has made. *See id.* at 14–15 (quoting *State v. Foster*, 390 So.2d 469, 470 (Fla. 3d DCA 1980)).

In *Gibson*, 968 So.2d at 631, the Second District held that the State had failed to establish that the drug-detection dog's alert provided probable cause for the search. The Second District, citing *Matheson*, reiterated that “[t]o demonstrate that an alert by a narcotics detection dog is sufficiently reliable to furnish probable cause to search, the State must introduce evidence of the dog's ‘track record’ or performance history.” *Id.* (citing *Matheson*, 870 So.2d at 14). In that case, the dog's handler had testified that the dog was certified and had completed 400 hours of training. *Id.* at 631–32. However, the State “failed to elicit any testimony from him regarding the dog's track record” in the field; although the “officer admitted that drugs are not always found when the dog alerts, ... he could not quantify the percentage of false alerts.” *Id.* at 632. The Second District concluded that, under *Matheson*, the officer's testimony was inadequate to establish the dog's reliability. *Id.*

As explained in our analysis below, we agree with the Second District's bottom-line conclusion that the State cannot establish probable cause by introducing evidence only that the dog was trained and \*765 certified. We disapprove of the conclusions of the First, Fourth, and Fifth Districts that the State can meet its burden of establishing probable cause by presenting evidence that the dog

is trained and certified to detect illegal drugs and then shifting the burden to the defendant to counter this evidence.

## ANALYSIS

[1][2] As previously stated, the question presented concerns the showing that the State must make to establish probable cause for a warrantless search of a vehicle based on a drug-detection dog's alert to the vehicle. This issue involves a trial court's determination of the legal issue of probable cause, which we review de novo. *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Pagan v. State*, 830 So.2d 792, 806 (Fla.2002). However, we defer to a trial court's findings of historical fact as long as they are supported by competent, substantial evidence. *See Connor v. State*, 803 So.2d 598, 608 (Fla.2001).

[3] The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV; *see also* art. I, § 12, Fla. Const. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz*

*v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted).

[4][5][6][7] One such exception to the warrant requirement is the “automobile exception,” first established by the United States Supreme Court in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). In *Carroll*, the United States Supreme Court held that a warrantless search of a vehicle based upon probable cause to believe that the vehicle contains contraband is not unreasonable within the meaning of the Fourth Amendment. *Id.* at 149, 45 S.Ct. 280; *see also Maryland v. Dyson*, 527 U.S. 465, 467, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999) (stating that the automobile exception permits police to search a vehicle if probable cause exists to believe it contains contraband). The automobile exception of not requiring a warrant is based on the inherent mobility of vehicles, as well as the reduced expectation of privacy in a vehicle. *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996). Although an individual has a “reduced expectation of privacy in an automobile, owing to its pervasive regulation,” *id.*, he or she “does not surrender all the protections of the Fourth Amendment by entering an automobile,” *New York v. Class*, 475 U.S. 106, 112, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986). “A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search.” *United*



*States v. Ortiz*, 422 U.S. 891, 896, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975) (footnote omitted). The cases make clear that probable cause to search a vehicle is based on the same facts that would justify the issuance of a warrant. See *Dyson*, 527 U.S. at 467, 119 S.Ct. 2013. “The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize.” *United States v. Ross*, 456 U.S. 798, 823, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

\*766 [8][9][10] The United States Supreme Court has explained that the probable cause standard “depends on the totality of the circumstances.” *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003). “Probable cause exists when ‘there is a *fair probability* that contraband or evidence of a crime will be found in a particular place.’” *United States v. Grubbs*, 547 U.S. 90, 95, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006) (emphasis added) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). “[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.” *Pringle*, 540 U.S. at 370–71, 124 S.Ct. 795 (alteration in original) (quoting *Gates*, 462 U.S. at 232, 103 S.Ct. 2317). Probable cause is a “‘practical, nontechnical conception’ that deals with

‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’ ” *Id.* at 370, 124 S.Ct. 795 (quoting *Gates*, 462 U.S. at 231, 103 S.Ct. 2317).

[11] This Court, obliged to follow precedent from the United States Supreme Court, has explained:

An examination of Supreme Court jurisprudence reveals a decidedly broad definition of when law enforcement officers have the authority to engage in a warrantless search:

Probable cause exists where “the facts and circumstances within their (the officers’) knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that” an offense has been or is being committed.

*State v. Betz*, 815 So.2d 627, 633 (Fla.2002) (quoting *Brinegar v. United States*, 338 U.S. 160, 175–76, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)). The burden is on the State to demonstrate that the police had probable cause to conduct a warrantless search. *See Doctor v. State*, 596 So.2d 442, 445 (Fla.1992); *see also Hilton v. State*, 961 So.2d 284, 296 (Fla.2007) (“When a search or seizure is conducted without a warrant, the government



bears the burden of demonstrating that the search or seizure was reasonable.”).

When it comes to the use of drug-detection dogs, the United States Supreme Court has explained that “the use of a well-trained narcotics-detection dog—one that ‘does not expose noncontraband items that otherwise would remain hidden from public view,’—during a lawful traffic stop, generally does not implicate legitimate privacy interests.” *Caballes*, 543 U.S. at 409, 125 S.Ct. 834 (citation omitted) (quoting *Place*, 462 U.S. at 707, 103 S.Ct. 2637).<sup>FN6</sup> *Caballes* and *Place* considered the issue of whether the use of a “well-trained” drug-detection dog constitutes a search and not the circumstances of how the trial court determines whether the drug-detection dog is well-trained and when the dog’s alert will constitute probable cause to believe that there are illegal substances within the vehicle.

FN6. We note that the United States Supreme Court appears to have equated a “well-trained” drug-detection dog with one who “does not expose noncontraband items that otherwise would remain hidden from public view.” *Caballes*, 543 U.S. at 408–09, 125 S.Ct. 834; *Place*, 462 U.S. at 707, 103 S.Ct. 2637. The danger of a dog not being well-trained is that the dog may expose noncontraband items to public view. In this sense, a well-trained dog is a reliable dog. Further, a well-trained dog is not necessarily

a dog that has merely been trained and certified; the best way of evaluating whether a dog is in fact "well-trained," or reliable, is to evaluate the totality of the circumstances, including the dog's training, certification, and performance.

\*767 Because the dog cannot be cross-examined like a police officer whose observations at the scene may provide the basis for probable cause, the trial court must be able to assess the dog's reliability by evaluating the dog's training, certification, and performance, as well as the training and experience of the dog's handler. Similar to situations where probable cause to search is based on the information provided by informants, the trial court must be able to evaluate the reliability of the dog based on a totality of circumstances. *See Gates*, 462 U.S. at 230-31, 103 S.Ct. 2317. A critical part of the informant's reliability is the informant's track record of giving accurate information in the past.<sup>FN7</sup>

FN7. *See, e.g., McCray v. Illinois*, 386 U.S. 300, 303, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967) ("Jackson testified that he had been acquainted with the informant for approximately a year, that during this period the informant had supplied him with information about narcotics activities 'fifteen, sixteen times at least,' that the information had proved to be accurate and had resulted in numerous arrests and

convictions. On cross-examination, Jackson was even more specific as to the informant's previous reliability, giving the names of people who had been convicted of narcotics violations as the result of information the informant had supplied."); *State v. Peterson*, 739 So.2d 561, 564 (Fla.1999) ("Officer NeSmith stated in his affidavit that the informant 'has provided information to law enforcement on at least twenty occasions regarding illegal criminal activities occurring in Escambia County, Florida that has proven to be accurate and true.' Generally, this level of previous contact is sufficient to establish veracity."); *State v. Butler*, 655 So.2d 1123, 1130 (Fla.1995) ("In this case, we have an informant whose veracity (i.e., credibility and reliability) is unquestioned. Officer Putnam had used information from this informant at least 20 times, and 60 to 70% of the tips resulted in felony arrests. As the district court acknowledged, the informant's reliability is 'fairly well established.' "); *see also* 2 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.3 (4th ed. 2004) ("When the police undertake to establish the credibility of an informant as a part of their task of establishing that probable cause exists for an arrest or search made or to be made exclusively or primarily upon that informant's story, they invariably

do so by referring to the past performance of that informant.”).

[12] Like the informant whose information forms the basis for probable cause, where the dog's alert is the linchpin of the probable cause analysis, such as in this case, the reliability of the dog to alert to illegal substances within the vehicle is crucial to determining whether probable cause exists. If a dog is not a reliable detector of drugs, the dog's alert in a particular case, by itself, does not indicate that drugs are probably present in the vehicle. In fact, if the dog's ability to alert to the presence of illegal substances in the vehicle is questionable, the danger is that individuals will be subjected to searches of their vehicles and their persons without probable cause. Conversely, if a dog is a reliable detector of drugs, the dog's alert in a particular case can indicate that drugs are probably present in the vehicle. In those circumstances, the drug-detection dog's alert will indicate to the officer that there is a “fair probability that contraband” will be found. *Gates*, 462 U.S. at 238, 103 S.Ct. 2317. Thus, to determine whether the officer has a reasonable basis for concluding that the dog's alert indicates a fair probability that contraband will be found, the trial court must be able to adequately make an objective evaluation of the reliability of the dog.

We conclude that when a dog alerts, the fact that the dog has been trained and certified is simply not enough to establish probable cause to

search the interior of the vehicle and the person. We first note that there is no uniform standard in this state or nationwide for an acceptable level of training, testing, or certification for drug-detection dogs. In contrast to dual-purpose drug-detection dogs, which are apparently\*768 certified by FDLE, no such required certification exists in this state for dogs like Aldo, who is a single-purpose drug-detection dog.

In the absence of a uniform standard, the reliability of the dog cannot be established by demonstrating only that a canine is trained and certified. “[S]imply characterizing a dog as ‘trained’ and ‘certified’ imparts scant information about what the dog has been conditioned to do or not to do, or how successfully.” *Matheson*, 870 So.2d at 14. In other words, whether a dog has been sufficiently trained and certified must be evaluated on a case-by-case basis. For example, in a decision from the United States Court of Appeals for the Eleventh Circuit, the court described a dog as a “highly trained and credentialed professional whose integrity and objectivity are beyond reproach” because it had graduated from the U.S. Canine Academy and Police Dog Training Center, had been certified by the National Narcotics Detector Dog Association, and was described by one trainer as “probably one of the best dogs he had trained in the 23 years he had been doing it.” *United States v. \$242,484.00*, 389 F.3d 1149, 1159, 1165 (11th Cir.2004).



One commentator has described the “ ‘mythic infallibility’ of the dog’s nose”:

In cases involving dog sniffing for narcotics it is particularly evident that the courts often accept the mythic dog with an almost superstitious faith. The myth so completely has dominated the judicial psyche in those cases that the courts either assume the reliability of the sniff or address the question cursorily; the dog is the clear and consistent winner.

Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 Hastings L.J. 15, 22, 28 (1990). Another commentator has noted that “not all dogs are well-trained and well-handled, nor are all dogs temperamentally suited to the demands of being a working dog. Some dogs are distractible or suggestible, and may alert improperly. Many factors may lead to an unreliable alert.” Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L.Rev. 1, 4 (2006).

Second, and related to the first concern, any presumption of reliability based only on the fact that the dog has been trained and certified does not take into account the potential for false alerts, the potential for handler error, and the possibility of alerts to residual odors. As the Second District aptly observed, “[a]n officer who knows only that his dog is trained and certified, and who has no other information, at most can only suspect that a

search based on the dog's alert will yield contraband. Of course, mere suspicion cannot justify a search." *Matheson*, 870 So.2d at 13.

"A false [alert] is an alert by the dog in the absence of the substance it is trained to detect." Myers, *supra*, at 12. False alerts may lead to the search of a person who is innocent of any wrongdoing. *Id.* Cases demonstrate that the false-alert rate among certified detection dogs varies significantly. Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 Neb. L.Rev. 735, 757 (2007).

Coupled with the concern for false alerts is the potential for handler error and handler cuing. "Handler error affects the accuracy of a dog. The relationship between a dog and its handler is the most important element in dog sniffing, providing unlimited opportunities for the handler to influence the dog's behavior." *Id.* at 762. Therefore, the trial court must also focus on the training of the handler. "Handlers interpret their dogs' signals, and the handler alone makes the final decision whether a dog has detected narcotics. Practitioners\*769 in the field reveal that handler error accounts for almost all false detections." Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 425 (1997).



A related problem is the possibility of handler cuing. "Even the best of dogs, with the best-intentioned handler, can respond to subconscious cuing from the handler. If the handler believes that contraband is present, they may unwittingly cue the dog to alert regardless of the actual presence or absence of any contraband. Finally, some handlers may consciously cue their dog to alert to ratify a search they already want to conduct." Myers, *supra*, at 5 (footnote omitted).

An alert to a residual odor is different from a false alert, although both types of alerts may result in subjecting the person and vehicle to an invasive search when no contraband is actually present. Because of the sensitivity (or hypersensitivity) of a dog's nose, a dog may alert to a residual odor, which may not indicate the presence of drugs in the vehicle at the time of the sniff.

Given the level of sensitivity that many dogs possess, it is possible that if the person being searched had attended a party where other people were using drugs, the dog would alert because of the residue on clothing or fabric. It is possible that in a vehicle that had formerly been used to transport drugs, the dog would alert, despite the fact that drugs were no longer present. Or it is possible that some sort of residue normally associated with drugs was present.

Myers, *supra*, at 4-5 (footnotes omitted). Therefore, the alert may not even mean that drugs were ever present in the vehicle or on the person.

Because of these variables, a necessary part of the totality of the circumstances analysis in a given case regarding the dog's reliability is an evaluation of the evidence concerning whether the dog in the past has falsely alerted, indicating that the dog is not well-trained, or whether the alerts indicate a dog who is alerting on a consistent basis to residual odors, which do not indicate that drugs are present in the vehicle. Accordingly, evidence of the dog's performance history in the field—and the significance of any incidents where the dog alerted without contraband being found—is part of a court's evaluation of the dog's reliability under a totality of the circumstances analysis.<sup>FN8</sup> In particular, when assessing the factors bearing on the dog's reliability, it is important to include, as part of a complete evaluation, how often the dog has alerted in the field without illegal contraband having been found.

FN8. "Information that merely tallies successes does not provide a complete picture. Well-presented data should include the number of failures, if any, and the conditions under which they occurred." Bird, *supra*, at 432.

The State argues that records of field performance are meaningless because dogs do not

distinguish between residual odors and drugs that are present and, thus, alerts in the field without contraband having been found are merely unverified alerts, not false alerts. This assertion, if correct, raises its own set of concerns as it relates to a probable cause determination of whether the dog's alert indicates a fair probability that there are drugs presently inside the vehicle.

In any event, the record in this case does not contain any testimony as to whether dogs can be trained to distinguish between residual odors and drugs and, further, there were no field records or testimony presented in this case in order to allow for a careful examination of the significance of field performance. Officer Wheetley was unable to testify as to a \*770 complete picture of Aldo's performance in the field. In future cases, the State can explain the significance of the percentage of unverified alerts in the field. The trial court would then be able to evaluate how any inability to distinguish between residual odors and drugs that are actually present bears on the reliability of the alert in establishing probable cause.

[13] Finally, to adopt the view of the First, Fourth, and Fifth Districts would be to place the burden on the defendant to uncover all records and evidence that might challenge a presumption of reliability—evidence that is exclusively within the control of law enforcement authorities and, further, evidence that law enforcement agencies may choose not to record, such as in this case.<sup>FN9</sup>

Placing this burden on the defendant is contrary to the well-established proposition that the burden is on the State to establish probable cause for a warrantless search. *See Doctor*, 596 So.2d at 445. Because the State must establish that the officer has a reasonable basis for believing that his or her dog is reliable in order to prove probable cause based on the dog's alert, the State carries the burden of presenting the necessary records and evidence for the trial court to consider in adequately evaluating the dog's reliability.

FN9. As stated by Justice Lewis in his special concurrence in *Jardines v. State*, — So.3d —, 2011 WL 1405080 (Fla.2011): “The complete lack of a uniform or standardized system of certifying drug detection canines renders it unduly burdensome for a defendant to challenge the validity of [a] ... dog sniff ... that results in an arrest.” — So.3d at — (Lewis, J., specially concurring). This burden is made especially difficult by the disparity among various training, testing, and certification programs.

Some courts have adopted a similar totality of the circumstances approach to determining a dog's reliability. For example, in *State v. Nguyen*, 726 N.W.2d 871, 876–77 (S.D.2007), the defendant asserted that the dog's field activity report reflected the dog's unreliability. The South Dakota Supreme Court stated that while the “apparently

false indications [gave it] pause, ... [it did] not believe these field reports should be relied on, standing alone, in measuring [the dog's] reliability." *Id.* at 877. The court explained:

In our view, trial courts making drug dog reliability determinations may consider a variety of elements, including such matters as the dog's training and certification, its successes and failures in the field, and the experience and training of the officer handling the dog. Under the totality of the circumstances, the court can then weigh each of these factors.

*Id.*

Further, other courts have endorsed the trial court's consideration of multiple factors, with emphasis on the number of "false alerts" by the dog. For instance, in *State v. England*, 19 S.W.3d 762, 768 (Tenn.2000), the Tennessee Supreme Court rejected a per se rule that probable cause may be established through a positive alert by a trained narcotics detection dog. The court reasoned that the probable cause determination should turn on the dog's reliability and that the trial court should ensure that the dog is reliable by making factual findings. *Id.* The court set forth the following framework for this required reliability determination:

Accordingly, in our view, the trial court, in making the reliability determination may

consider such factors as: the canine's training and the canine's "track record," with emphasis on the amount of false negatives and false positives the dog has furnished. The trial court should also consider the officer's training\*771 and experience with this particular canine.

*Id.*

Additionally, in *United States v. Florez*, 871 F.Supp. 1411, 1420-21 (D.N.M.1994), the United States District Court for the District of New Mexico observed that certified dogs have falsely alerted and found the fact that a dog is certified should not be sufficient to establish probable cause. While analogizing to an informant's tip, the court set forth the following framework for a probable cause analysis:

In summary, where adequate and comprehensive records are maintained on a particular narcotics dog, and include results of controlled alerts made in training, as well as actual alerts in the field, the dog's reliability could be sufficiently established either through the records themselves or testimony from the dog's trainer who maintained the records. In this respect, the dog's alert is analogous to information provided by a reliable informant, and his alert without more could establish probable cause.



However, where records are not kept or are insufficient to establish the dog's reliability, an alert by such a dog is much like hearsay from an anonymous informant, and corroboration is necessary to support the unproven reliability of the alerting dog and establish probable cause. To accept less would compromise the very principles that the requirement of probable cause was designed to protect.

*Id.* at 1424. The court found support for this position from *United States v. Nielsen*, 9 F.3d 1487, 1491 (10th Cir.1993), wherein the Tenth Circuit stated, "If this were a case of an alert by a trained drug sniffing dog with a good record, we would not require corroboration to establish probable cause." In sum, if the court relies only on training and certification records and fails to consider other factors concerning the dog's performance, then the court does not have a complete picture of the numerous circumstances that necessarily bear on the reasonableness of the officer's belief in the dog's reliability and whether the dog's alert in a particular case indicates a fair probability that there were drugs present inside the vehicle.

For the above reasons, we adopt a totality of the circumstances approach and hold that the State, which bears the burden of establishing probable cause, must present all records and evidence that are necessary to allow the trial court to evaluate the reliability of the dog. The State's presentation



of evidence that the dog is properly trained and certified is the beginning of the analysis. Because there is no uniform standard for training and certification of drug-detection dogs, the State must explain the training and certification so that the trial court can evaluate how well the dog is trained and whether the dog falsely alerts in training (and, if so, the percentage of false alerts). Further, the State should keep and present records of the dog's performance in the field, including the dog's successes (alerts where contraband that the dog was trained to detect was found) and failures ("unverified" alerts where no contraband that the dog was trained to detect was found). The State then has the opportunity to present evidence explaining the significance of any unverified alerts, as well as the dog's ability to detect or distinguish residual odors. Finally, the State must present evidence of the experience and training of the officer handling the dog. Under a totality of the circumstances analysis, the court can then consider all of the presented evidence and evaluate the dog's reliability.

Contrary to the dissent's assertion that we "impose[ ] evidentiary requirements which can readily be employed to ensure that the police rely on drug detection dogs only when the dogs are shown to be virtually infallible," dissenting op. at 776, we do \*772 not hold in this case that the dog must be shown to be "virtually infallible." Just as it would be entirely relevant to know how many times an informant's tip resulted in contraband

being discovered, the reason that the State should keep records of the dog's performance both in training and in the field is so that the trial court may adequately evaluate the reasonableness of the officer's belief in the dog's reliability under the totality of the circumstances. Because the State bears the burden of establishing probable cause, if the courts are to make determinations of probable cause based on the alerts of dogs, who can neither be cross-examined nor otherwise independently assessed as to their reliability, it is appropriate to place the burden on the State to ensure uniformity in the way dogs are evaluated for reliability of their alerts. Nothing less than the sanctity of our citizens' constitutional rights to be secure from unreasonable searches and seizures in their homes, their vehicles, and their persons is at stake.

### THIS CASE

[14][15] In applying these standards to Harris's case, we hold that the trial court erred in concluding that the State presented sufficient evidence to establish probable cause to conduct a warrantless search of Harris's truck. We defer to a trial court's findings of fact as long as they are supported by competent, substantial evidence, but we review de novo a trial court's application of the law to the historical facts. *See Connor*, 803 So.2d at 608; *Pagan*, 830 So.2d at 806. However, in this case, the trial court did not make findings of historical fact.

The State presented the following evidence: Aldo had been trained to detect drugs since January 2004 and certified to detect drugs since February 2004; Officer Wheatley trains Aldo for approximately four hours per week, deploys Aldo approximately five times per month, and attends a forty-hour annual training seminar; and Aldo's success rate during training is "really good." Aldo's weekly training records reveal that from November 2005 to June 2006, Aldo performed satisfactorily 100% of the time. However, there was no testimony as to whether a satisfactory performance includes any false alerts. The record is also scarce on the details of Aldo's training, including whether the trainer was aware of the locations of the drugs <sup>FN10</sup> and whether the training simulated a variety of environments and distractions.<sup>FN11</sup>

FN10. *See* Bird, *supra*, at 424 (examining the potential for handler cues and suggesting that these cues can be "corrected in training by conducting practice sniffs where both the dog and handler do not know where the drugs are located").

FN11. *See, e.g.,* Bird, *supra*, at 413 (describing training procedures of the Rhode Island State Police: "During training exercises, trainers use distractions to test the dog's skill under adverse conditions. Officers will conduct tests, for example, near a noisy airplane or in a fish market, where

distracting sounds or scents dominate the area.” (footnotes omitted)); *id.* at 414 (describing training procedures of the United States Customs Service, which trains its dogs to “disregard potential distractions such as food, harmless drugs, and residual scents,” permitting “no false alerts and no missed drugs” (footnotes omitted)).

The State also did not introduce Aldo's field performance records so as to allow an analysis of the significance of the alerts where no contraband was found. In fact, Officer Wheetley testified that he does not keep records of Aldo's unverified alerts in the field; he documents only Aldo's successes. FN12 If an officer fails to keep records \*773 of his or her dog's performance in the field, the officer is lacking knowledge important to his or her belief that the dog is a reliable indicator of drugs. *Cf. Florida v. J.L.*, 529 U.S. 266, 271, 273–74, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) (concluding that police did not have reasonable suspicion based on an anonymous tip because the officers did not have sufficient information from the tip and were without means to test the informant's credibility and thus the tip's reliability, stating that “[t]he reasonableness of official suspicion must be measured by what the officers knew before they conducted their search”).

FN12. Because the State did not introduce Aldo's field performance records, this Court does not have the benefit of quantifying

Aldo's success rate in the field. *See, e.g., United States v. Anderson*, 367 Fed.Appx. 30, 32–33 (11th Cir.2010) (rejecting defendant's argument that probable cause was not established where dog could not distinguish between an odor and presence of narcotics because, even accepting the field performance statistics, the dog had a 55% accuracy rate in finding measurable amounts of drugs); *United States v. Kennedy*, 131 F.3d 1371, 1378 (10th Cir.1997) (finding that “a 70–80% success rate meets the liberal standard for probable cause” to issue a search warrant); *United States v. Scarborough*, 128 F.3d 1373, 1378 (10th Cir.1997) (holding that with an overall success rate of 92%, it was not clear error for the trial court to find that the dog was “a credible narcotics dog and that his alert adequately supports the finding of probable cause”); *United States v. Huerta*, 247 F.Supp.2d 902, 910 (S.D.Ohio 2002) (holding that a 65% accuracy rate, not counting instances involving trace amounts of narcotics or where handler assumed alert was to residual odor, was insufficient alone to justify probable cause determination based solely on the dog's alert); *State v. Miller*, 256 Wis.2d 80, 647 N.W.2d 348, 353 (App.2002) (concluding that where the dog had accurately indicated presence of illegal contraband or substances on thirty-five of



forty occasions (87.5%), the dog's alert created probable cause).

The State asserts that the only relevant records are the training records-not field records—since there is no such thing as a false alert in the field because a dog alerts to both actual drugs and residual odors. Thus, the State argues, when a dog alerts in the field and no contraband is found, there is no way to determine whether the dog was alerting to a residual odor or whether the dog falsely alerted. This is also of concern when probable cause for the search hinges on the dog's demonstrated reliability and thus the probability that the dog's alert indicates that contraband was present in the vehicle at the time of the alert. Because the State did not introduce field performance records, the State was not able to explain the significance of any unverified alerts in the field.

Further, the State failed to present any evidence regarding the criteria necessary for Aldo to obtain certification through Drug Beat K-9 certifications. This case is unlike *Coleman*, where evidence was introduced outlining the details of the training program, the criteria for choosing which dogs to use as drug dogs, and the criteria necessary for the dog and handler to pass the course and obtain "certification." 911 So.2d at 260. By contrast, the only evidence regarding the criteria used in Aldo's certification is a document simply stating that Aldo successfully found



twenty-eight grams of marijuana, five grams of methamphetamine, twenty-eight grams of cocaine, seven grams of heroin, seven grams of crack cocaine, and fifty grams of ecstasy. However, the record is silent on the circumstances of the certification, such as whether these drugs were hidden, whether the trainer was aware of the locations of the drugs, or whether the certification simulated the variety of environments and distractions found in the field. In the absence of uniform, standard criteria for certification, the State must do more than simply introduce evidence that the dog has been certified.

In this case, there are several other factors that call into question Aldo's reliability. First, the State failed to present any testimony regarding Aldo's ability to detect residual odors. When asked how \*774 long a residual odor can remain on the driver's side door handle, Officer Wheatley stated that he was not qualified to answer that question. While such testimony is not required, without this information, it is difficult to determine how this factor should apply, if at all. For example, in *State v. Cabral*, 159 Md.App. 354, 859 A.2d 285, 300 (2004), the Maryland Court of Special Appeals held that even though testimony was presented that the dog could have alerted to a residual odor that was seventy-two hours old, "such an ability serves to strengthen the argument that the dog has a superior sense of smell on which to rely to support a finding of probable cause." Alternatively, a trial court may find, after evaluating the testimony and

other evidence, that a dog's inability to distinguish between residual odors and actual drugs undermines a finding of probable cause.

Second, the State has failed to explain why an alert to a residual odor on the door handle would give rise to probable cause in this case. Officer Wheatley testified that Aldo alerted to the door handle and that, in his experience, this meant that somebody had touched or smoked narcotics and then transferred the odor to the door handle. Officer Wheatley further indicated that Aldo's alert led him to believe that the odor of narcotics was present on the door handle. However, neither Officer Wheatley nor the State has explained in this case why evidence of residual odor of narcotics on the vehicle's door handle gave rise to probable cause that there were drugs actually present in the vehicle at the time of the alert. Aldo's alert to the door handle in this case, standing alone, provides no basis for an objective probable cause determination that drugs were present inside the vehicle.

Thus, we conclude that the State did not meet its burden in demonstrating that Officer Wheatley had a reasonable basis for believing that Aldo was reliable at the time of the search and, thus, that Aldo's alert, the linchpin of the probable cause analysis in this case, indicated a fair probability that drugs would be found in the vehicle. Although the trial court found probable cause, the trial court did not make a specific finding as to Aldo's

reliability. The failure to make a finding on Aldo's reliability makes it difficult to determine how much weight to give Aldo's alert in the probable cause analysis.

Although not part of the determination of whether probable cause to conduct the search existed at that time, two additional facts in this case are illustrative of why it is important to engage in an inquiry of a dog's reliability, including an evaluation of the dog's performance in the field. First, as to the search in question, the police officer did not discover any drugs that Aldo was trained to detect. In other words, there is a chance that this case may have involved a false alert. Second, Harris introduced evidence in this case that Aldo alerted to the same door handle on the same vehicle subsequent to this arrest and no drugs were found.

The State argues that the alert at issue in this case and the subsequent alert were not false alerts because Aldo was alerting to residual odor on the door handle; Officer Wheetley also testified that when a dog alerts to a door handle it usually means that residual odor was transferred to the door handle by someone who had handled drugs. However, an alert to residual odor on the door handle, by itself, indicates only that someone who has come into contact with drugs touched the door handle at some point.

[16] In sum, we conclude that the State has failed to meet its burden of establishing probable cause. In the absence of a reliable alert, the other factors considered in the totality of circumstances \*775 analysis—Harris's expired tag, Harris's shaking, breathing rapidly, and inability to sit still, and Harris's open beer can—do not rise to the level of probable cause that there were illegal drugs inside the vehicle. Accordingly, the search of the vehicle violated the Fourth Amendment's prohibition on unreasonable searches and seizures.

### CONCLUSION

[17][18][19] For the above reasons, we quash *Harris* and disapprove *Coleman* and *Laveroni*. We approve *Gibson* and *Matheson* to the extent that they are consistent with this opinion. We hold the fact that a drug-detection dog has been trained and certified to detect narcotics, standing alone, is not sufficient to demonstrate the reliability of the dog. To demonstrate that an officer has a reasonable basis for believing that an alert by a drug-detection dog is sufficiently reliable to provide probable cause to search, the State must present evidence of the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability. The trial court must then assess

the reliability of the dog's alert as a basis for probable cause to search the vehicle based on a totality of the circumstances. Because in this case the totality of the circumstances does not support a probable cause determination, the trial court should have granted the motion to suppress. We remand for proceedings consistent with this opinion.

It is so ordered.

LEWIS, QUINCE, LABARGA, and PERRY, JJ.,  
concur.

CANADY, C.J., dissents with an opinion.

POLSTON, J., recused.

CANADY, C.J., dissenting.

Because the majority imposes an evidentiary burden on the State which is based on a misconception of the federal constitutional requirement for probable cause, I dissent. I would affirm the decision of the First District Court of Appeal on review; approve *State v. Coleman*, 911 So.2d 259 (Fla. 5th DCA 2005), and *State v. Laveroni*, 910 So.2d 333 (Fla. 4th DCA 2005); and disapprove *Gibson v. State*, 968 So.2d 631 (Fla. 2d DCA 2007), and *Matheson v. State*, 870 So.2d 8 (Fla. 2d DCA 2003).



In brief, the elaborate and inflexible evidentiary requirements the majority adopts are inconsistent with the proper understanding of probable cause as a “ ‘practical, non-technical conception’ that deals with ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’ ” *Maryland v. Pringle*, 540 U.S. 366, 370, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 231, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). In its effort to manage the conduct of law enforcement, the majority strays beyond what is necessary to determine if the Fourth Amendment's proscription of “unreasonable searches and seizures” has been violated. In establishing requirements for determining the lawfulness of a search based on the alert of a drug detection dog, the majority demands a level of certainty that goes beyond what is required by the governing probable cause standard.

The process of determining whether a search was reasonable because it is based on probable cause “does not deal with hard certainties, but with probabilities.” *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. \*776 1535, 75 L.Ed.2d 502 (1983) (plurality opinion) (quoting *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)). The probable cause standard “merely requires that the facts available to the officer would ‘warrant a man of reasonable caution in the belief’ ” that “evidence of a crime” may be found. *Id.* (quoting *Carroll v. United States*, 267



U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925)). “[I]t does not demand any showing that such a belief be correct or more likely true than false.” *Id.* Instead, the probable cause standard requires simply that the search be justified by what the officer reasonably believes to be “reasonably trustworthy information.” *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) (quoting *Carroll*, 267 U.S. at 162, 45 S.Ct. 280). The majority here, however, imposes evidentiary requirements which can readily be employed to ensure that the police rely on drug detection dogs only when the dogs are shown to be virtually infallible.

The record shows that the searching officer had an objectively reasonable basis for crediting the dog's alert. The State presented uncontroverted evidence that Aldo had been trained to detect drugs since January 2004 and certified to detect drugs since February 2004. Officer Wheatley testified that he trained Aldo approximately four hours per week, deployed Aldo approximately five times per month, and attended a forty-hour annual training seminar. Wheatley described Aldo's success rate during training as “really good.” Aldo's weekly training records reveal that from the November 2005 to June 2006, Aldo performed satisfactorily 100 percent of the time. Harris failed to present any evidence challenging Aldo's training or certification. Based on this record of historical facts, the majority's conclusion that the officer acted unconstitutionally is totally unwarranted.

*See Jones v. Commonwealth*, 277 Va. 171, 670 S.E.2d 727, 733 (2009) ("The narcotics detection dog's reliability can be established from its training and experience, as well as a proven track record of previous alerts to the existence of illegal narcotics. Specific certifications and the results of field testing are not required to establish a sufficient foundation [for the dog's reliability].")

Since there was no violation of the Fourth Amendment, the decision of the First District should be affirmed.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

First District - Case No. 1D06-6497

(Liberty County)

Nancy A. Daniels, Public Defender, and Glen P. Gifford, Division Chief Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida,

for Petitioner

Pamela Jo Bondi, Attorney General, Trisha Meggs Pate, Bureau Chief, Susan M. Shanahan and Natalie D. Kirk, Assistant Attorneys General, Tallahassee, Florida,

for Respondent

Supreme Court of Florida

THURSDAY, SEPTEMBER 22, 2011

CASE NO. SC08-1871

Lower Tribunal No.: 1D06-

6497

CLAYTON HARRIS  
FLORIDA

vs. STATE OF

---

Petitioner(s)

Respondent(s)

In light of the revised opinion, the Respondent's Motion for Rehearing is hereby denied.

PARIENTE, QUINCE, LABARGA, and PERRY,  
JJ., concur.

CANADY, C.J., and LEWIS, J., dissent.

POLSTON, J. recused.

A True Copy

Test:

/s/

---

Thomas D. Hall  
Clerk, Supreme Court

Served:

HON. JON S. WHEELER, CLERK

GLEN PHILLIP GIFFORD

PHILIP W. EDWARDS

NATALIE D. KIRK  
SUSAN MARY SHANAHAN  
HON. ROBERT HILL, CLERK  
HON. LOUIE RALPH SMITH, JR., JUDGE

# **OPPOSITION BRIEF**

No. 11-817

**IN THE  
SUPREME COURT OF THE UNITED STATES**

October Term, 2011

---

STATE OF FLORIDA,  
Petitioner

v.

CLAYTON HARRIS,  
Respondent.

---

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

---

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD  
ASSISTANT PUBLIC DEFENDER  
301 S. MONROE ST., SUITE 401  
TALLAHASSEE, FL 32301  
ATTORNEY FOR RESPONDENT AND  
COUNSEL OF RECORD

(COUNSEL OF RECORD IS A MEMBER OF THE BAR OF THIS COURT)



## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                                                                                               | <u>PAGE</u> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| TABLE OF CONTENTS.....                                                                                                                                                                                                                                                                                                        | i           |
| TABLE OF AUTHORITIES.....                                                                                                                                                                                                                                                                                                     | ii          |
| STATEMENT OF THE CASE.....                                                                                                                                                                                                                                                                                                    | 1           |
| REASONS FOR DENYING THE WRIT.....                                                                                                                                                                                                                                                                                             | 4           |
| I. THE DECISION BELOW MERELY APPLIES A<br>“TOTALITY OF THE CIRCUMSTANCES” APPROACH TO<br>THE DETERMINATION WHETHER A DRUG-DETECTOR<br>DOG’S ALERT TO A VEHICLE CONSTITUTES<br>PROBABLE CAUSE TO SEARCH, AND DOES NOT<br>CONFLICT WITH THIS COURT’S HOLDINGS THAT A<br>DRUG-DOG SNIFF IS NOT A FOURTH AMENDMENT<br>SEARCH..... | 4           |
| II. DRUG-DETECTOR DOGS REMAIN VIABLE<br>INDICATORS OF PROBABLE CAUSE EVEN WHEN<br>THEIR PERFORMANCE IN THE FIELD IS CONSIDERED. ....                                                                                                                                                                                          | 8           |
| III. CERTIORARI REVIEW RISKS EMBROILING THIS<br>COURT IN SETTING STANDARDS FOR DRUG-<br>DETECTOR DOG TRAINING AND CERTIFICATION. ....                                                                                                                                                                                         | 11          |
| CONCLUSION.....                                                                                                                                                                                                                                                                                                               | 14          |
| CERTIFICATE OF SERVICE .....                                                                                                                                                                                                                                                                                                  | 15          |

## TABLE OF AUTHORITIES

| <u>CASES</u>                                                                                    | <u>PAGE(S)</u> |
|-------------------------------------------------------------------------------------------------|----------------|
| <u>Alabama v. White</u> , 496 U.S. 325 (1990) .....                                             | 7              |
| <u>Florida v. J.L.</u> , 529 U.S. 266 (2000) .....                                              | 2              |
| <u>Harris v. State</u> , 71 So. 3d 756 (Fla. 2011) .....                                        | 1, 4, 9        |
| <u>Illinois v. Caballes</u> , 543 U.S. 405 (2005) .....                                         | 1, 4           |
| <u>Illinois v. Gates</u> , 462 U.S. 213 (1983) .....                                            | 7, 11          |
| <u>State v. Coleman</u> , 911 So. 2d 259 (Fla. 5th DCA 2005) .....                              | 2, 12          |
| <u>State v. Foster</u> , 252 P.3d 292 (Or. 2011) .....                                          | 6, 9, 12       |
| <u>State v. Helzer</u> , 252 P.3d 288 (Or. 2011) .....                                          | 6, 12, 13      |
| <u>State v. Laveroni</u> , 910 So. 2d 333 (Fla. 4th DCA 2005) .....                             | 6              |
| <u>State v. Miller</u> , 256 Wis.2d 80, 647 N.W.2d 348 (App.2002) .....                         | 9              |
| <u>United States v. Anderson</u> , 367 Fed.Appx. 30, (11th Cir.2010)<br>(unpublished) .....     | 8              |
| <u>United States v. Huerta</u> , 247 F.Supp.2d 902 (S.D.Ohio 2002) .....                        | 8              |
| <u>United States v. Kennedy</u> , 131 F.3d 1371, (10th Cir.1997) .....                          | 8              |
| <u>United States v. Koon Chung Wu</u> , 217 Fed.Appx. 240 (4th Cir.2007)<br>(unpublished) ..... | 9              |
| <u>United States v. Limares</u> , 269 F.3d 794 (7th Cir.2001) .....                             | 9              |
| <u>United States v. Ludwig</u> , 641 F.3d 1243 (10th Cir. 2011) .....                           | 6, 9           |
| <u>United States v. Place</u> , 462 U.S. 696 (1983) .....                                       | 1, 4           |
| <u>United States v. Scarborough</u> , 128 F.3d 1373 (10th Cir.1997) .....                       | 8              |

CONSTITUTIONAL PROVISIONS

PAGE(S)

Fourth Amendment .....4, 11

## STATEMENT OF THE CASE

Respondent accepts the Petitioner's Statement of the Case with the following qualifications. The "Question Presented" by the Petitioner assumes "a well-trained narcotics dog." The Florida Supreme Court explored that very question:

When it comes to the use of drug-detection dogs, the United States Supreme Court has explained that "the use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view,'—during a lawful traffic stop, generally does not implicate legitimate privacy interests." Caballes, 543 U.S. at 409, 125 S.Ct. 834 (citation omitted) (quoting Place, 462 U.S. at 707, 103 S.Ct. 2637). Caballes and Place considered the issue of whether the use of a "well-trained" drug-detection dog constitutes a search and not the circumstances of how the trial court determines whether the drug-detection dog is well-trained and when the dog's alert will constitute probable cause to believe that there are illegal substances within the vehicle.

Harris v. State, 71 So. 3d 756, 766 (Fla. 2011). Addressing those issues – whether a dog is well-trained and when its alert constitutes probable cause – the court relied on the following evidence bearing on an alert and vehicle search on June 24, 2006:

Aldo had been trained to detect drugs since January 2004 and certified to detect drugs since February 2004; Officer Wheetley trains Aldo for approximately four hours per week, deploys Aldo approximately five times per month, and attends a forty-hour annual training

seminar; and Aldo's success rate during training is "really good." Aldo's weekly training records reveal that from November 2005 to June 2006, Aldo performed satisfactorily 100% of the time. However, there was no testimony as to whether a satisfactory performance includes any false alerts. The record is also scarce on the details of Aldo's training, including whether the trainer was aware of the locations of the drugs and whether the training simulated a variety of environments and distractions.

The State also did not introduce Aldo's field performance records so as to allow an analysis of the significance of the alerts where no contraband was found. In fact, Officer Wheetley testified that he does not keep records of Aldo's unverified alerts in the field; he documents only Aldo's successes. If an officer fails to keep records of his or her dog's performance in the field, the officer is lacking knowledge important to his or her belief that the dog is a reliable indicator of drugs. Cf. Florida v. J.L., 529 U.S. 266, 271, 273-74, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) (concluding that police did not have reasonable suspicion based on an anonymous tip because the officers did not have sufficient information from the tip and were without means to test the informant's credibility and thus the tip's reliability, stating that "[t]he reasonableness of official suspicion must be measured by what the officers knew before they conducted their search").

Further, the State failed to present any evidence regarding the criteria necessary for Aldo to obtain certification through Drug Beat K-9 certifications. This case is unlike [State v. Coleman, 911 So. 2d 259 (Fla. 5th DCA 2005)], where evidence was introduced outlining the details of the training program, the criteria for choosing which dogs to use as drug dogs, and the criteria necessary for the dog and handler to pass the course and obtain "certification." 911 So.2d at 260. By contrast, the only evidence regarding the criteria used in

Aldo's certification is a document simply stating that Aldo successfully found twenty-eight grams of marijuana, five grams of methamphetamine, twenty-eight grams of cocaine, seven grams of heroin, seven grams of crack cocaine, and fifty grams of ecstasy. However, the record is silent on the circumstances of the certification, such as whether these drugs were hidden, whether the trainer was aware of the locations of the drugs, or whether the certification simulated the variety of environments and distractions found in the field. In the absence of uniform, standard criteria for certification, the State must do more than simply introduce evidence that the dog has been certified.

Id. at 772-74. The court also discussed the state's failure to present evidence on the dog's ability to detect residual odors and the significance of a "residual odor" alert. Id. at 773-74.



## **REASONS FOR DENYING THE WRIT**

### **I. THE DECISION BELOW MERELY APPLIES A “TOTALITY OF THE CIRCUMSTANCES” APPROACH TO THE DETERMINATION WHETHER A DRUG-DETECTOR DOG’S ALERT TO A VEHICLE CONSTITUTES PROBABLE CAUSE TO SEARCH, AND DOES NOT CONFLICT WITH THIS COURT’S HOLDINGS THAT A DRUG-DOG SNIFF IS NOT A FOURTH AMENDMENT SEARCH.**

The Florida Supreme Court decision is not in conflict with United States v. Place, 462 U.S. 696 (1983), and Illinois v. Caballes, 543 U.S. 405 (2005), on whether “a canine sniff by a well-trained canine narcotics detection dog . . . provides probable cause to search a vehicle.” Petition at i. The petition’s formulation of the first of its reasons for granting the writ confuses the premise in those decisions, that the dogs were “well-trained,” with the holding that a sniff by such a dog is not a search under the Fourth Amendment. The Florida Supreme Court recognized and articulated the distinction:

Caballes and Place considered the issue of whether the use of a “well-trained” drug-detection dog constitutes a search and not the circumstances of how the trial court determines whether the drug-detection dog is well-trained and when the dog’s alert will constitute probable cause to believe that there are illegal substances within the vehicle.

Harris, 71 So. 3d at 766. The court then assessed whether, under the totality of the circumstances, the handler in this instance had good reason to believe that the

dog's alert to the door handle of Harris' truck created probable cause to believe illegal narcotics would be found within. Factors informing the court's determination included: (1) the dog was last certified as a reliable detector of narcotics in February, 2004, 28 months before the alert in this case; (2) the state presented no evidence "regarding the criteria necessary for [the dog] to obtain certification;" (3) there was no testimony on whether the dog's "100 % satisfactory" performance in ongoing training included any false alerts, "whether the trainer was aware of the locations of the drugs and whether the training simulated a variety of environments and distractions;" and (4) the state did not introduce the dog's field performance records "so as to allow an analysis of the significance of the alerts where no contraband was found." Id. at 772-73.

The absence of evidence on the fourth consideration corresponded to the state's position below that "the only relevant records are the training records – not field records." Id. at 773. The Petitioner now recognizes that, "[t]o be sure, field activity reports may be considered." Petition at 25. This is an important concession, for it validates the inclusion of the unavailability of field-performance records in the Florida Supreme Court's totality-of-the-circumstances assessment of probable cause for a warrantless search:

[T]he reason that the State should keep records of the dog's performance both in training and in the field is so that the trial court may adequately evaluate the reasonableness of the officer's belief in the dog's

reliability under the totality of the circumstances. Because the State bears the burden of establishing probable cause, if the courts are to make determinations of probable cause based on the alerts of dogs, who can neither be cross-examined nor otherwise independently assessed as to their reliability, it is appropriate to place the burden on the State to ensure uniformity in the way dogs are evaluated for reliability of their alerts.

Id. at 772.

Other courts throughout the country have factored field-performance records into probable cause determinations involving alerts by drug-detector dogs. See, e.g., State v. Foster, 252 P.3d 292, 301 (Or. 2011) (noting that 66 percent “find” rate in field performance records confirms that dog “can accurately detect the odor of drugs present in an environment, as he was trained to do”); United States v. Ludwig, 641 F.3d 1243, 1252 (10th Cir. 2011) (concluding that, if compelled to “affix[] figures to probable cause,” court would find 58 % field success rate sufficient); State v. Laveroni, 910 So. 2d 333, 335 (Fla. 4th DCA 2005) (agreeing with conclusion of another state court that, “because these dogs are not always correct, their past performance records are relevant”).

Despite the agreed-upon relevance of field performance records, the police agency in this case did not make or keep records of the results of searches prompted by the dog’s alert. Harris, 71 So. 3d at 760. Cf. State v. Helzer, 252 P.3d 288, 290 (Or. 2011) (noting that although the state documented alerts in the

field over a several-month period, the dog's handler kept no record of deployments in which the dog did not alert). The Florida Supreme Court made a practical decision that, as the party that bears the burden of justifying a warrantless search and the entity which trains, handles, and deploys a drug-sniff dog, the government should produce field-performance records when challenged to demonstrate that a dog's alert in a particular case created probable cause for a search.

The decision is also consistent with this Court's recognition that "probable cause is a fluid concept" that "turn[s] on the assessment of probabilities in particular factual contexts." Illinois v. Gates, 462 U.S. 213, 232 (1983). Probable cause to search, like reasonable suspicion to detain, is "dependent upon both the content of information possessed by police and its degree of reliability." Alabama v. White, 496 U.S. 325, 330 (1990). In seeking to narrow the criteria for the probable cause determination to evidence of training and certification, the Petitioner would permit the prosecution to present only some of the information possessed by police that bears on the reliability of a drug-detector dog. Its perspective places undue emphasis on "isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate." Gates, 462 U.S. at 235. The decision in this case employs totality-of-the-circumstances analysis required by Gates and White without contravening Place and Caballes. Certiorari review to vindicate this Court's Fourth Amendment precedent is unnecessary.

## **II. DRUG-DETECTOR DOGS REMAIN VIABLE INDICATORS OF PROBABLE CAUSE EVEN WHEN THEIR PERFORMANCE IN THE FIELD IS CONSIDERED.**

The Petitioner and its Amici from Virginia, etc., assert that factoring field performance into the probable-cause determination from a drug-sniff dog's alert will severely curtail the use of dogs in interdicting drug possession and trafficking. Precedent belies this claim. The Florida Supreme Court pointed to numerous cases in which a dog's "batting average" established probable cause:

Because the State did not introduce Aldo's field performance records, this Court does not have the benefit of quantifying Aldo's success rate in the field. See, e.g., United States v. Anderson, 367 Fed.Appx. 30, 32–33 (11th Cir.2010) (unpublished) (rejecting defendant's argument that probable cause was not established where dog could not distinguish between an odor and presence of narcotics because, even accepting the field performance statistics, the dog had a 55% accuracy rate in finding measurable amounts of drugs); United States v. Kennedy, 131 F.3d 1371, 1378 (10th Cir.1997) (finding that "a 70–80% success rate meets the liberal standard for probable cause" to issue a search warrant); United States v. Scarborough, 128 F.3d 1373, 1378 (10th Cir.1997) (holding that with an overall success rate of 92%, it was not clear error for the trial court to find that the dog was "a credible narcotics dog and that his alert adequately supports the finding of probable cause"); United States v. Huerta, 247 F.Supp.2d 902, 910 (S.D.Ohio 2002) (holding that a 65% accuracy rate, not counting instances involving trace amounts of narcotics or where handler assumed alert was to residual odor, was insufficient alone to justify probable cause determination based solely on the dog's alert); State v. Miller, 256 Wis.2d 80, 647

N.W.2d 348, 353 (App.2002) (concluding that where the dog had accurately indicated presence of illegal contraband or substances on thirty-five of forty occasions (87.5%), the dog's alert created probable cause).

Harris, 71 So. 3d at 772 n.12. See also United States v. Limares, 269 F.3d 794, 797 (7th Cir.2001) (accepting as reliable a dog that gave false positives between 7 and 38% of the time); United States v. Koon Chung Wu, 217 Fed.Appx. 240, 246 (4th Cir.2007) (unpublished) (“[A]n accuracy rate of 60% is more than reliable enough for [the dog's] alert to have established probable cause”); Foster, 252 P.3d at 301 (concluding that officers could reasonably rely on alert by dog with 66 percent “find rate,” combined with certification and certification); Ludwig, 641 F.3d at 1252 (10th Cir. 2011) (finding 58 % “enough” for probable cause from alert).

In this case, the state failed to provide field-performance records when they were requested in discovery. Harris, 71 So. 3d at 761 n.4. Testimony in the suppression hearing revealed that the dog's handler did not keep records showing when drugs were not found after a positive alert by the dog. Id. at 761. At its core, the decision below merely calls upon police agencies who use drug-detector dogs to keep field records so that judicial determinations of probable cause for a warrantless search prompted by a dog's alert rest on the totality of the circumstances, not merely facts the government chooses to document and present.



When these records are kept and made part of the probable cause determination, as in the cases cited above, courts nonetheless have had little difficulty finding probable cause in many instances . Demonstrably, the decision below neither “threatens to significantly undermine the use of canines for drug interdiction” (Amicus Brief of Virginia, etc., at 10) nor “virtually negate[s] the use of dogs as a valuable crime fighting tool to law enforcement and society.” Petition at 35-36.

If and when a court bases a probable cause determination primarily on a dog’s field performance records while dismissing other evidence of reliability, the Petitioner’s concern for the ongoing use of drug-detector dogs may ripen to the level warranting this Court’s attention. At this point, the concern remains speculative, and does not warrant the grant of certiorari in this case.

### **III. CERTIORARI REVIEW RISKS INVOLVING THIS COURT IN PROMULGATING STANDARDS FOR DRUG-DETECTOR DOG TRAINING AND CERTIFICATION.**

The Petitioner seeks to have this Court hold that “[t]he fact that a dog has been trained and certified is sufficient evidence to establish probable cause to search a vehicle.” Petition at 13. However, neither the Petitioner nor its Amici have explained what they mean by trained and certified. Elevating these two criteria over others in a probable-cause determination could draw the Court into the task of setting thresholds sufficient to render a drug-detector dog a reliable source of probable cause.

Precedent shows that many organizations train and certify drug-detector dogs. There is no indication in case law that methods, standards, and criteria within the industry are uniform. The significance of certification appears particularly elusive. See Harris, 71 So. 3d at 760-61 (“Florida does not have a set standard for certification for single-purpose dogs such as Aldo.”); Foster, 352 P.3d at 294-95 (certification by Oregon Police Canine Association is “purely private; no Oregon statutes or regulations set standards for or otherwise governing drug-detection dog training and certification or record-keeping”). The diversity in this area makes creation of a baseline for training and certification adequate to assure a dog’s reliability difficult if not impossible. As this case demonstrates, evidence

concerning methods, standards, and frequency can differ vastly for both training and certification, even in the same jurisdiction:

This case is unlike [State v. Coleman, 911 So. 2d 259 (Fla. 5th DCA 2005)], where evidence was introduced outlining the details of the training program, the criteria for choosing which dogs to use as drug dogs, and the criteria necessary for the dog and handler to pass the course and obtain “certification.” 911 So.2d at 260. By contrast, the only evidence regarding the criteria used in Aldo’s certification is a document simply stating that Aldo successfully found twenty-eight grams of marijuana, five grams of methamphetamine, twenty-eight grams of cocaine, seven grams of heroin, seven grams of crack cocaine, and fifty grams of ecstasy. However, the record is silent on the circumstances of the certification, such as whether these drugs were hidden, whether the trainer was aware of the locations of the drugs, or whether the certification simulated the variety of environments and distractions found in the field.

Harris, 71 So. 3d at 773. Decisions issued the same day by the Oregon Supreme Court in State v. Helzer, 252 P.3d 288 (Or. 2011), and State v. Foster, 252 P.3d 292 (Or. 2011), also illustrate this point:

The state in this case, however, established little beyond the bare fact that Babe and Stokoe had been certified by OPCA. A comparison to the record made in Foster reveals the voids. See [Foster], 252 P.3d 292 (describing record). The drug-detection dog and its handler in Foster went through their initial formal training with OPCA and continued training with the assistance of an OPCA “master trainer.” The record in Foster is significantly more developed on the particular training they received initially, as well as their continued training afterwards. The record is also significantly more developed on the

OPCA certification test that they took, and the standards to which they were held in order to pass it. See id. (describing same). No similar record was made in this case. In particular, the nature of Babe's initial training by Code Three Canine—the kind of training, its length, and the standards used—was not established by the state. Likewise, the record provides no description of or details about Stokoe and Babe's team training with Code Three Canine after Stokoe purchased Babe. Unlike in Foster, the record does not reveal what training Stokoe received to avoid handler cues or other errors that can cause a dog to alert falsely. Stokoe testified vaguely to his use of blanks and food distractions in his own training, but he provided no information beyond that to explain how his training builds accuracy and reliability in both Babe's abilities and his handling of Babe.

Helzer, 252 P.3d at 291 (footnote and state reporter citation omitted).

The concern over variable standards and methods led the Florida Supreme Court in this case to look toward additional factors, including field performance, in assessing whether a dog alert creates probable cause in an individual case. See Harris, 71 So. 3d at 773 ("In the absence of uniform, standard criteria for certification, the State must do more than simply introduce evidence that the dog has been certified.") In seeking to have this Court hold that field performance is not a component of the probable cause determination, the Petitioner would cast this Court as the ultimate regulator of drug dog training and certification standards for police agencies through the nation. This is a role best left declined.

## **CONCLUSION**

The Respondent respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

---

GLEN P. GIFFORD  
ASSISTANT PUBLIC DEFENDER  
LEON COUNTY COURTHOUSE  
301 S. MONROE ST., SUITE 401  
TALLAHASSEE, FLORIDA 32301  
(850) 606-8500  
[glen.gifford@flpd2.com](mailto:glen.gifford@flpd2.com)

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari in Florida v. Harris has been furnished by U.S. Mail to Robert J. Krauss, Chief Assistant Attorney General, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607-7013; E. Duncan Getchell, Solicitor General of Virginia, 900 E. Main St., Richmond, VA 23219; and Arthur T. Daus III, 2417 N.E. 22nd Terrace, Fort Lauderdale, FL 33305, this \_\_\_\_ day of February, 2012

---

GLEN P. GIFFORD  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NO. 664261  
LEON COUNTY COURTHOUSE  
301 S. MONROE ST., SUITE 401  
TALLAHASSEE, FLORIDA 32301  
(850) 606-8500



**AMICUS  
CURIAE  
BRIEF**

MOTION FILED

JAN 24 2012

No. 11-817

---

In The  
Supreme Court of the United States

---

STATE OF FLORIDA,  
*Petitioner,*  
v.

CLAYTON HARRIS,  
*Respondent.*

---

On Petition for Writ of Certiorari to the  
Supreme Court of Florida

---

MOTION FOR LEAVE TO FILE BRIEF AND  
BRIEF OF THE NATIONAL POLICE CANINE  
ASSOCIATION AND POLICE K-9 MAGAZINE  
AS AMICI CURIAE IN SUPPORT OF  
PETITIONER

---

Arthur T. Daus III  
2417 N.E. 22<sup>nd</sup> Terrace  
Fort Lauderdale, Florida 33305  
[Tel.] (954) 242-5584  
[Ted.Daus@PoliceK-9Magazine.com](mailto:Ted.Daus@PoliceK-9Magazine.com)  
Counsel for *Amici Curiae*

**MOTION OF NATIONAL POLICE CANINE  
ASSOCIATION AND POLICE K-9 MAGAZINE  
FOR LEAVE TO FILE AN *AMICI CURIAE*  
BRIEF**

The National Police Canine Association and Police Canine Magazine ("amici") hereby move, pursuant to S. Ct. R. 37.2(b), for leave to file an *amici curiae* brief in support of the petition for writ of certiorari to the Supreme Court of Florida. *Amici* are filing this motion because after receiving consent\* from the petitioner, we were denied consent from the Respondent. A copy of the proposed brief is attached.

As explained on page 1 of the attached brief under "Interest of *Amici Curiae*", the National Police Canine Association is a large organization consisting of police canine handlers from all across the country. The Association set the national standards for certification for its membership as related to drug detection dogs. Moreover, this case is of particular interests to the Association due to the fact that they seek to represent not only the national membership but also specifically their members located in the State of Florida which will be directly impacted by this Courts action.

\* Request for consent was sought from both Petitioner and Respondent with formal notice of intent to file this brief to both parties given to counsel of record on Jan. 13, 2012. Petitioner consented and Respondent did not consent.

Police Canine Magazine is a national publication having a readership of over 20,000 police canine handlers that live and work in all fifty (50) states in the union. Police Canine Magazine has a training and consulting branch in which they organize national training seminars throughout the United States in efforts to better educate law enforcement on the proper use of drug dogs. They are the leader in the industry in the area of police canine usage providing invaluable information to federal, state and local canine law enforcement. Accordingly, *amici* have a unique interest in seeing that the legal standard set by this court of a canine team being well trained and certified be followed and enforced without the cumbersome extraneous requirements that have been improperly imposed on handlers, when it comes to the area of drug dog reliability, by the Florida Supreme Court.

This brief will assist the Court in determining whether to grant certiorari because amici are well positioned to point out the importance of this case to the police canine industry. The *amici* can bring to the for front and inform the Court of the broad implications of this case across the country in the areas of police dog vendors, police dog trainers, police dog handlers, police dog organizations and the multiple police agencies on the federal, state and local levels. *Amici* cannot emphasize enough the importance of uniformity in the application of this courts precedent as to the standard of well trained and certified police drug dogs.

Accordingly, *amici* respectfully request that the Court grant leave to file the attached brief as *amici curiae*.

Respectfully submitted,

Arthur T. Daus III

*Counsel of Record*

2417 N.E. 22<sup>nd</sup> Terrace

Fort Lauderdale, FL 33305

(954) 242-5584

*Counsel for Amici*

January, 2012

## TABLE OF CONTENTS

|                                                                                                                                                                                                                               | PAGE     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| Table of Authorities.....                                                                                                                                                                                                     | ii       |
| Interest of Amici Curiae .....                                                                                                                                                                                                | 1        |
| Summary of the Argument.....                                                                                                                                                                                                  | 2        |
| Argument.....                                                                                                                                                                                                                 | 3        |
| <b>THE STATE CAN MAKE A PRIMA FACIE<br/>SHOWING OF PROBABLE CAUSE FOR A<br/>SEARCH BASED ON A NARCOTICS<br/>DETECTION DOG'S ALERT BY<br/>DEMONSTRATING THAT THE DOG HAS<br/>BEEN PROPERLY TRAINED, AND<br/>CERTIFIED.....</b> | <b>3</b> |
| State Authority.....                                                                                                                                                                                                          | 3        |
| Federal Authority.....                                                                                                                                                                                                        | 10       |
| Conclusion.....                                                                                                                                                                                                               | 15       |



| Table of Authorities                                                                                         | Page          |
|--------------------------------------------------------------------------------------------------------------|---------------|
| <i>Coleman v. State</i> ,<br>911 So. 2d 259 (Fla. Dist. Ct. App. 2005).....                                  | 2,3,5         |
| <i>Dawson v. State</i> ,<br>518 S.E.2d 477 (Ga. Ct. App. 1999).....                                          | 4             |
| <i>Debruler v. Commonwealth</i> ,<br>231 S.W.3d 753 (Ky. 2007).....                                          | 8,9           |
| <i>Florida v. Jardines</i> ,<br>United States Supreme Case No.<br>Certiorari granted on January 6, 2012..... | 14            |
| <i>Harris v. State</i> ,<br>71 So.3d 756 (Fla. 2011).....                                                    | <i>passim</i> |
| <i>Harris v. State</i> ,<br>989 So. 2d 1214 (Fla. Dist. Ct. App. 2008).....                                  | 2,3           |
| <i>Illinois v. Caballes</i> ,<br>543 U.S. 405 (2005).....                                                    | <i>passim</i> |
| <i>Indianapolis v. Edmond</i> ,<br>531 U.S. 405 (2005).....                                                  | <i>passim</i> |
| <i>Joe v. State</i> ,<br>73 So.3d 791 (Fla. Dist. Ct. App. 2011).....                                        | 6             |
| <i>Matheson v. State</i> ,<br>870 So. 2d 8 (Fla. Dist. Ct. App. 2003).....                                   | 4             |

|                                                                                  |       |
|----------------------------------------------------------------------------------|-------|
| <i>Ohio v. Simmons</i> ,<br>2011 WL 6179577 (Ohio App. 11 Dist.).....            | 7     |
| <i>State v. Laveroni</i> ,<br>910 So. 2d 333 (Fla. Dist. Ct. App. 2005)...       | 2,3,4 |
| <i>State v. Lopez</i> ,<br>850 N.E.2d 781 (Ohio App. 2006).....                  | 6     |
| <i>State v. Nguyen</i> ,<br>726 N.W.2d 871 (S.D. 2007).....                      | 9     |
| <i>State v. Nguyen</i> ,<br>811 N.E.2d 1180 (Ohio App. 6 Dist.,2004).....        | 7     |
| <i>State v. Yeoumans</i> ,<br>172 P.3d 1146 (Idaho App. 2007).....               | 8     |
| <i>United States v. Allen</i> ,<br>159 F.3d 832, (4th Cir. 1998).....            | 11    |
| <i>United States v. Age</i> ,<br>Slip Copy, 2011 WL 4495307 C.A.4 (Md.2011) ...  | 11    |
| <i>United States v. Berry</i> ,<br>90 F.3d 148 (6 <sup>th</sup> Cir. 1996).....  | 12    |
| <i>United States v. Boxley</i> ,<br>373 F.3d 759 (6 <sup>th</sup> Cir.2004)..... | 10    |
| <i>United States v. Hill</i> ,<br>195 F.3d 258 (6 <sup>th</sup> Cir. 1980).....  | 11    |
| <i>United States v. Klein</i> ,<br>626 F.2d 22 (7 <sup>th</sup> Cir. 1980).....  | 12    |

|                                                                                           |               |
|-------------------------------------------------------------------------------------------|---------------|
| <i>United States v. Lopez</i> ,<br>380 F.3d 538 (1 <sup>st</sup> Cir. 2004).....          | 10            |
| <i>United States v. Olivera-Mendez</i> ,<br>484 F.3d 505 (8 <sup>th</sup> Cir. 2007)..... | 12            |
| <i>United States v. Outlaw</i> ,<br>319 F.3d 701 (5 <sup>th</sup> Cir. 2003).....         | 10            |
| <i>United States v. Place</i> ,<br>462 U.S. 696 (1983).....                               | <i>passim</i> |
| <i>United States v. Robinson</i> ,<br>390 F.3d 853 (6 <sup>th</sup> Cir. 2004).....       | 10            |
| <i>United States v. Sundby</i> ,<br>186 F.3d 873 (8 <sup>th</sup> Cir. 1999).....         | 11            |

**INTEREST OF AMICI CURIAE<sup>1</sup>**

Police canine handlers, all across the United States, have an ardent interest in combating illegal narcotics. Drug detection dogs perform a crucial service for law enforcement related to these efforts. Police K-9 Magazine is a national publication with a 20,000 canine handler readership that covers every state in the union. Most of those law enforcement officers are canine handlers that have a vested interest in the issue before the court. The National Police Canine Association is an association that governs, sets standards and certifies police work dogs for their membership. Upon passing their independent certification, police dogs are certified that they are well trained and have the unique ability to locate the source of existing narcotic odor. The National Police Canine Association is headquartered out of Arizona. The amici have a substantial interest in this Court's determination of whether the Florida Supreme Court has decided an important federal question in a way that conflicts with the established Fourth Amendment precedent of this Court by holding that an alert by a well-trained narcotics detection dog certified to detect the odor of illegal contraband is insufficient to establish probable cause for the search of a vehicle? The Magazine and all law enforcement officers and canine handlers in all fifty states along with the

<sup>1</sup> Pursuant to Supreme Court Rule 37, amici provided counsel of record for all parties with timely notice of the intent to file this brief. Consent was granted by the Petitioner and not by the Respondent. Therefore, attached with this brief is a motion for leave of court to file. This brief was authored by counsel for the amici and funded by the amici.

National Police Canine Association have a distinct interest in the correct disposition of this matter.

### **SUMMARY OF THE ARGUMENT**

The State can make a prima facie showing of probable cause for a warrantless search based on a narcotic dog's alert by establishing that the dog has been properly trained, and independently certified. After the state meets its initial burden, the dog's reliability can then be contested by the defendant through challenging the performance records of the dog, training records of the dog or other evidence, such as expert testimony.

Because an alert by a well trained and certified narcotics detection dog, standing alone, provides an officer with probable cause to search, this Court should reverse the decision of the Florida Supreme Court in their decision *Harris v. State*, 71 So. 3d 756 (Fla. 2011) and thereby approve of the First District Court of Appeal's decision in *Harris v. State*, 989 So. 2d 1214 (Fla. Dist. Ct. App. 2008), and in doing so, approve the holdings of two others Florida District Courts of Appeal in *State v. Coleman*, 911 So. 2d 259, (Fla.. Dist. Ct. App. 2005), and *State v. Laveroni*, 910 So. 2d 333 (Fla. Dist. Ct. App. 2005) and bring the State of Florida in line with the vast majority of the courts and jurisdictions across the country that properly follow this court's precedent of *Illinois v. Caballes*,

543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *United States v. Place*, 462 U.S. 696 (1983).

## ARGUMENT

**THE STATE CAN MAKE A PRIMA FACIE SHOWING OF PROBABLE CAUSE FOR A SEARCH BASED ON A NARCOTICS DETECTION DOG'S ALERT BY DEMONSTRATING THAT THE DOG HAS BEEN PROPERLY TRAINED, AND CERTIFIED.**

## STATE AUTHORITY

The First District Court of Appeal of Florida (hereinafter "1st D.C.A.") decided *Harris* relying on The Fifth District Court of Appeal's of Florida (hereinafter "5<sup>th</sup> D.C.A.") decision in *State v. Coleman*, 911 So.2d 259 (Fla. 5<sup>th</sup> D.C.A. 2005) and The Fourth District Court of Appeal's of Florida (hereinafter "4<sup>th</sup> D.C.A.") decision in *State v. Laveroni*, 910 So.2d 333 (Fla. 4<sup>th</sup> D.C.A. 2005) that the state can make a Prima Facie showing, of a narcotics dog reliability, by demonstrating that the dog has been properly trained and certified . Thereby, the three intermediate appellate courts of Florida have aligned themselves with this Honorable Court's established precedent in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983) by



holding that the state make a prima facie showing of a narcotics dog's reliability by merely demonstrating canine has been properly trained and certified.

For example, the Fourth District Court of Appeal wrote in *Laveroni*, "Our review of cases from around the country indicates that *Matheson*, [*Harris* is based upon *Matheson*] which held that the state must establish the reliability of the dog through performance records in order to show probable cause, is out of the mainstream". (Emphasis added) The 4<sup>th</sup> D.C.A. researched extensively the issue that is before the Court relying on both State and Federal authority.

The Court of Appeals in and for the State of Georgia in *Dawson v. State*, 518 S.E. 2d 477 (Ga. Ct. App. 1999) on this specific issue held that evidence of certification as a narcotics detection dog constitutes prima facie evidence of reliability but that this presumption can be rebutted by the defendant with proof of the failure rate of the dog or through other evidence the defendant wished to present, with the final determination to be made by the trial court. The 4<sup>th</sup> D.C.A., in relying on *Dawson* and rejecting the *Harris* style of reasoning of the Florida Supreme Court, aligned itself with the mainstream legal philosophy all over this country.

The 5<sup>th</sup> D.C.A. found itself in a unique position in resolving this issue in their opinion *State v. Coleman*, 911 So.2d 259 (Fla. 5<sup>th</sup> D.C.A. 2005). The 5<sup>th</sup> D.C.A. rejected the *Harris* style of reasoning of the Florida Supreme Court as flawed and united itself with the 4<sup>th</sup> D.C.A. and the rest of the country in finding: "Having reviewed both decisions and the authorities upon which they rely, we align ourselves with the Fourth District Court and conclude: [T]hat the state can make a prima facie showing of probable cause based on a narcotic dog's alert by demonstrating that the dog has been properly trained and certified. If the defendant wishes to challenge the reliability of the dog, he can do so by using the performance records of the dog, or other evidence, such as expert testimony.... Whether probable cause has been established will then be resolved by the trial court." *Coleman at 261*. Thereby, aligning themselves with the legal precedent of this Honorable Court decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983).

Because of the Florida Supreme Court's *Harris* decision, the District Courts of Appeal are now not following this Court decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983) stating that a well-

trained and certified narcotics dog provides probable cause and instead are now applying the "[T]he State must present the training and certification records, an explanation of the meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer..." *Joe v. State*, 73 So.3d 791 (Fla. 5<sup>th</sup> DCA 2011)

State courts across the country have ruled on this issue following the authority of the United States Supreme Court. In *State v. Lopez*, 166 Ohio App.3d 337, 850 N.E. 2d 781 (2006) the Ohio Court of Appeals held that "...the majority hold that the state can establish reliability by presenting evidence of the dog's training and certification, which can be testimonial or documentary. Once the state establishes reliability, the defendant can attack the dog's "credibility" by evidence relating to training procedures, certification standards, and real-world reliability". Thus aligning themselves with the legal precedent of this Honorable Court decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983).

Ohio Courts have continued to dismiss defense arguments that the state cannot establish probable cause for a search by introducing evidence that the dog was trained and certified. The Ohio Court of Appeals, as recently as December 12, 2011, held that *United States v. Place* (1983), 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (holding a K-9 sniff by a "well-trained narcotics-detection dog" as "*sui generis*" because it "discloses only the presence or absence of narcotics, a contraband item"). *Ohio v. Simmons*, 2011 WL 6179577 (Ohio App. 11 Dist.) "[O]nce a trained drug dog alerts to the odor of drugs from a lawfully detained vehicle, an officer has probable cause to search the vehicle for contraband." "Ample evidence related to Rebel's training and certification was presented during the suppression hearing to establish that he is a "well-trained narcotics dog" under *Place*, supra. ...Based on that information, we presume that Rebel is a reliable narcotics dog, and Mr. Simmons failed to put on any evidence to the contrary." *Simmons*, supra.

*State v. Nguyen*, 157 Ohio App.3d 482, 2004-Ohio-2879, engaged in a substantial survey of federal and state law related to the matter of establishing K-9 reliability and the evidence required to do so.

The *Nguyen* court recognized that the national trend stated "that a drug dog's training and certification records can be used to uphold a finding of probable cause to search and can be used to show reliability, if required, but canine reliability does not always need to be shown by real world records." *Id.* at ¶ 46. In conclusion, the Sixth District held that "proof of the fact that a drug dog is properly trained and certified is the only evidence material to a determination that a particular dog is reliable." *Simmons*, supra.

The Court of Appeals of Idaho in *State v. Yeoumans*, 172 P.3d 1146 (Ct.App.2007) The Idaho court noted the isolated legal *Harris* style of reasoning used by the Florida Supreme Court as flawed. In so doing, once again a state court, aligned themselves with the legal precedent of this Honorable Court decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983).

The Supreme Court of the Commonwealth of Kentucky, in a dog tracking case (a dog that smells and follows human scent), held in *Debruler v. Commonwealth*, 231 S.W.3d 752 (Ky.2007) that the Commonwealth provided sufficient foundation for admission at trial of the dog's tracking ability. As to the issue of the dog's training and qualifications, the Kentucky Supreme Court found

“...Officers Howard and Morgan provided evidence that the dogs had been trained at an Indiana dog-training facility. According to Officer Howard's testimony about Denise [the 1<sup>st</sup> dog], she had been certified in tracking by the Owensboro Police Department and is recertified every year following thirty-two hours of additional training. Furthermore, she completes practice runs every week. Officer Morgan testified that Bady [the 2<sup>nd</sup> dog] has been certified by the United States Police Canine Association and competes twice a year to maintain this certification. Like Bady, she completes practice runs on a weekly basis”. *Debruler at 758.*

The Amici notes the rationale above, that if evidence of a dog's unique olfactory ability meets the admissibility standard at trial by the officer's testimony related to training and certification, then certainly it should be sufficient to establish a *prima facie* presumption of reliability at a motion to suppress which may be rebutted by the defense.

The Supreme Court of South Dakota tackled the similar issue before this Honorable Court in their decision *State v. Nguyen*, 726 N.W.2d 871 (S.D. 2007). The Supreme Court of South Dakota held that a drug detection canine was deemed reliable based upon the presentation of its certification and training.



The South Dakota Supreme Court was aware and rejected the *Harris* style of reasoning used by the Florida Supreme Court as flawed. Through this finding, once again a state court, aligned themselves with the legal precedent of this Honorable Court decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983).

### FEDERAL AUTHORITY

Federal Courts have repeatedly held that appropriate certification by an organization is sufficient to show reliability of a dog. See *United States v. Robinson*, 390 F.3d 853 (6th Cir. 2004) reh'g en banc denied, Feb. 5, 2005 (testimony by the handler that dog was trained and certified was sufficient to show reliability for purposes of probable cause); *United States v. Lopez*, 380 F.3d 538 (1st Cir. 2004), cert. denied, 543 U.S. 1074, 125 S.Ct. 924, 160 L.Ed.2d 812 (2005) (handler's testimony that the dog was certified on the day of the sniff and had never given a false indication was sufficient to show reliability); *United States v. Boxley*, 373 F.3d 759 (6th Cir.), cert. denied, 543 U.S. 972, 125 S.Ct. 435, 160 L.Ed.2d 345 (2004); *United States v. Outlaw*, 319 F.3d 701 (5th Cir. 2003) (reliability acceptable when handler and dog have completed all standard training procedures for drug detecting teams); *United*

*States v. Hill*, 195 F.3d 258 (6th Cir. 1999), cert. denied, 528 U.S. 1176, 120 S.Ct. 1207, 145 L.Ed.2d 1110 (2000) (handler's inability to state with precision what in-service training should be conducted; reliability nonetheless established); *United States v. Sundby*, 186 F.3d 873 (8th Cir. 1999) (training records were not required to show reliability).

The Supreme Court has repeatedly held that a drug dog sniff is not a search under the Fourth Amendment and a reliable dog alert provides probable cause that illegal drugs are present. *Illinois v. Caballes*, 543 U.S. 405 (2005). Moreover, the United States Fourth Circuit Court of Appeal recently held "We have rejected a requirement that "dog alert testimony must satisfy the requirements for expert scientific testimony ... [because] the dog's alert ... would serve not as actual evidence of drugs, but simply to establish probable cause to obtain a warrant to search for such substantive evidence." *United States v. Allen*, 159 F.3d 832, 839-40 (4th Cir.1998)." *U.S. v. Age*, Slip Copy, 2011 WL 4495307 C.A.4 (Md.2011). "Assuming, without deciding, that we would require specific evidence of a dog's reliability before permitting his alert to provide probable cause, we find sufficient evidence in this case. The Government provided evidence regarding the dog's detailed training and continuing certification." *Age*, *supra*.

Notably, the United States Court of Appeals for the Eight Circuit in their opinion *Untied States v. Olivera-Mendez*, 484 F.3d 505, 512 (8<sup>th</sup> Cir. 2007) wrote “We have held that to establish a dog’s reliability for the purpose of a search warrant application, the affidavit need only state the dog has been trained and certified to detect drug and a detailed account of the dog’s track record or education is unnecessary.” If the canine’s reliability in a search warrant affidavit is established by merely stating that the dog is trained and certified allowing for a finding of probable cause to issue the warrant to enter into someone’s property, then it goes without saying that establishing the canine’s training and certification through testimony at a motion to suppress should surely be sufficient to establish a *prima facie* finding of reliability that the defendant may rebut at the hearing. See; *United States v. Klein*, 626 F.2d 22 (7<sup>th</sup> Cir. 1980) (finding the affiant’s representation to the magistrate that the dog “graduated from a training class in drug detection in October 1978” and “has proven reliable in detecting drug and narcotics on prior occasions” sufficient.) and *United States v. Berry*, 90 F.3d 148 (6<sup>th</sup> Cir. 1996) (finding contrary to defendant’s suggestion, to establish probable cause, the affidavit need not describe the particulars of the dog’s training. Instead, the affidavit’s accounting of the dog sniff indicating the presence of controlled substances

and its reference to the dog's training in narcotics investigations was sufficient to establish the dog's training and reliability.)

Drawing an analogy to search warrant law, the State's search warrant is presumed valid at a motion to suppress hearing. When the defendant is challenging the validity of a search warrant, the prosecution is afforded a presumption that the issuing magistrate acted properly in determining probable cause prior to signing the warrant. The presumption may be rebutted by the defendant but, the burden is on the defendant to attack the foundation of the warrant.

Therefore, the legal philosophy of the request of the petitioner is already well established in United States criminal law. The petitioner merely is requesting that this Honorable Court treat the issue of a dog's training and certification in the same fashion. The *Amici* wish to emphasize that in reversing the Florida Supreme Court and establishing this presumption, in no way deprives the defendant of his right to confront the officer regarding his canine partner's reliability. The training records and certification documentation are discoverable. They can be reviewed by the defendant and challenged in court. The trial court, at the close of all the evidence at the motion to suppress, is still free to determine the reliability of the dog. Enabling the State to make this *prima*

*facie* showing merely puts the proverbial ball in the defendant's court and deprives him of nothing.

The significant flaw in the Florida Supreme Court's *Harris* analysis is their focus on their requirement that the state be mandated to present to the trial court the dog's field performance records, along with concentrating on the issue of residual odor. The Florida Supreme Court's mistake is losing focus of the basic premises that dogs do not find drugs but instead locate drug odor. Which is why the rigorous standards set by the independent national governing bodies for dog certification for determining reliability, that are being basically ignored in the *Harris* reasoning, need to be given their due deference in court.

This case is uniquely suited for a granting of certiorari in light of this court granting review of *Florida v. Jardines*, Case No. 11-564 (Jan. 6, 2012). These cases go hand in hand with each other because once an officer uses the narcotics dog, with or without a search warrant for the front door sniff of a house, the Florida Supreme Court has set forth the wrong standard of review for the reliability of the dog.

This Honorable Court needs to address this critical issue and bring the State of Florida back in line with this Court's precedent by reversing the Florida Supreme Court.

## Conclusion

The Court should grant the petition for a writ of certiorari, set the case for briefing and oral argument with the eventual outcome being that of reversal of the Florida Supreme Court because allowing the ruling to stand would threaten a widely used drug-fighting tactic due to the fact that the Florida Supreme Courts decision conflicts with this high court's precedents in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983).

Respectfully submitted,

Arthur T. Daus III  
2417 N.E. 22<sup>nd</sup> Terrace  
Fort Lauderdale, Florida 33305  
[Tel.] (954) 242-5584  
Ted.Daus@PoliceK-9Magazine.com  
Counsel for *Amici Curiae*

January 2012

**AMICUS  
CURIAE  
BRIEF**



JAN 30 2012

OFFICE OF THE CLERK

**In The  
Supreme Court of the United States**

STATE OF FLORIDA,

*Petitioner,*

v.

CLAYTON HARRIS,

*Respondent.*

**On Petition For A Writ Of Certiorari  
To The Supreme Court Of Florida**

**AMICUS BRIEF OF THE COMMONWEALTH OF  
VIRGINIA AND THE STATES OF DELAWARE,  
HAWAII, KANSAS, MISSOURI, NEBRASKA,  
OREGON, TEXAS AND UTAH  
IN SUPPORT OF PETITIONER**

KENNETH T. CUCCINELLI, II  
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.  
Solicitor General of Virginia  
dgetchell@oag.state.va.us  
*Counsel of Record*

CHARLES E. JAMES, JR.  
Chief Deputy  
Attorney General

WESLEY G. RUSSELL, JR.  
Deputy Attorney General  
wrussell@oag.state.va.us

OFFICE OF THE  
ATTORNEY GENERAL  
900 East Main Street  
Richmond, Virginia 23219  
Telephone: (804) 786-7240  
Facsimile: (804) 371-0200

*Counsel for the  
Commonwealth of Virginia*

January 30, 2012

[Additional Amici Listed On Inside Cover]

JOSEPH R. BIDEN, III  
Attorney General  
of Delaware  
Carvel State Office Bldg.  
820 N. French Street  
Wilmington, DE 19801

DAVID M. LOUIE  
Attorney General  
of Hawai'i  
425 Queen Street  
Honolulu, Hawaii 96813  
Tel: (808) 586-1500

DEREK SCHMIDT  
Attorney General  
of Kansas

JOHN CAMPBELL  
Chief Deputy  
Attorney General  
120 S.W. 10th Avenue,  
2nd Floor  
Topeka, KS 66612  
Tel: (785) 296-2215

CHRIS KOSTER  
Attorney General  
of Missouri  
Supreme Court Building  
207 West High Street  
Jefferson City, MO 65101  
(573) 751-3321

JON BRUNING  
Attorney General of the  
State of Nebraska  
P.O. Box 98920  
Lincoln, NE 68509

JOHN R. KROGER  
Attorney General  
State of Oregon  
1162 Court St. N.E.  
Salem, Oregon 97301

GREG ABBOTT  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

MARK L. SHURTLEFF  
Utah Attorney General  
Utah State Capitol  
Suite #230  
P.O. Box 142320  
Salt Lake City, Utah  
84114-2320  
Tel: (801) 538-9600

## TABLE OF CONTENTS

|                                                                                                                          | Page |
|--------------------------------------------------------------------------------------------------------------------------|------|
| TABLE OF AUTHORITIES .....                                                                                               | ii   |
| STATEMENT OF THE IDENTITY, INTEREST<br>AND AUTHORITY OF AMICI TO FILE .....                                              | 1    |
| ARGUMENT.....                                                                                                            | 2    |
| I. THE DECISION BELOW MISCONSTRUES<br>THIS COURT'S PRECEDENTS AND<br>DEEPENS A CONFLICT AMONG THE<br>JURISDICTIONS ..... | 2    |
| II. THE DECISION BELOW THREATENS<br>TO SIGNIFICANTLY UNDERMINE THE<br>USE OF CANINES FOR DRUG INTER-<br>DICTION.....     | 10   |
| CONCLUSION .....                                                                                                         | 15   |

## TABLE OF AUTHORITIES

|                                                                  | Page                   |
|------------------------------------------------------------------|------------------------|
| CASES                                                            |                        |
| <i>Arizona v. Evans</i> ,<br>514 U.S. 1 (1995).....              | 9                      |
| <i>Atwater v. Lago Vista</i> ,<br>532 U.S. 318 (2001).....       | 13                     |
| <i>Blair v. Commonwealth</i> ,<br>204 S.W. 67 (Ky. 1918) .....   | 3                      |
| <i>England v. State</i> ,<br>19 S.W.3d 762 (Tenn. 2000) .....    | 6                      |
| <i>Florida v. Harris</i> ,<br>No. 11-817 (Dec. 21, 2011) .....   | 2                      |
| <i>Florida v. Royer</i> ,<br>460 U.S. 491 (1983).....            | 3                      |
| <i>Harris v. State</i> ,<br>71 So. 3d 756 (Fla. 2011).....       | 1, 2, 7, 8, 12, 13, 14 |
| <i>Herring v. United States</i> ,<br>555 U.S. 135 (2008).....    | 14                     |
| <i>Illinois v. Caballes</i> ,<br>543 U.S. 405 (2005).....        | 9                      |
| <i>Illinois v. Gates</i> ,<br>462 U.S. 213 (1983).....           | 8, 13                  |
| <i>Jones v. Commonwealth</i> ,<br>670 S.E.2d 727 (Va. 2009)..... | 5                      |
| <i>Jones v. United States</i> ,<br>362 U.S. 257 (1960).....      | 8                      |
| <i>Kentucky v. King</i> ,<br>131 S. Ct. 1849 (2011).....         | 9                      |

## TABLE OF AUTHORITIES—Continued

|                                                                              | Page |
|------------------------------------------------------------------------------|------|
| <i>Maryland v. Pringle</i> ,<br>540 U.S. 366 (2003).....                     | 13   |
| <i>State v. Foster</i> ,<br>252 P.3d 292 (Or. 2011) .....                    | 6    |
| <i>State v. Nguyen</i> ,<br>726 N.W.2d 871 (S.D. 2007) .....                 | 4, 6 |
| <i>United States v. Berry</i> ,<br>90 F.3d 148 (6th Cir. 1996) .....         | 3, 5 |
| <i>United States v. Delaney</i> ,<br>52 F.3d 182 (8th Cir. 1995) .....       | 8    |
| <i>United States v. Diaz</i> ,<br>25 F.3d 392 (6th Cir. 1994) .....          | 4, 5 |
| <i>United States v. Kennedy</i> ,<br>131 F.3d 1371 (10th Cir. 1997) .....    | 3, 4 |
| <i>United States v. Kitchell</i> ,<br>653 F.3d 1206 (10th Cir. 2011).....    | 3    |
| <i>United States v. Klein</i> ,<br>626 F.2d 22 (7th Cir. 1980) .....         | 5    |
| <i>United States v. Limares</i> ,<br>269 F.3d 794 (7th Cir. 2001) .....      | 5    |
| <i>United States v. Lingenfelter</i> ,<br>997 F.2d 632 (9th Cir. 1993) ..... | 3    |
| <i>United States v. Ludwig</i> ,<br>10 F.3d 1523 (10th Cir. 1993) .....      | 3, 9 |
| <i>United States v. Meyer</i> ,<br>536 F.2d 963 (1st Cir. 1976).....         | 9    |

## TABLE OF AUTHORITIES—Continued

|                                                                              | Page |
|------------------------------------------------------------------------------|------|
| <i>United States v. Owens</i> ,<br>167 F.3d 739 (1st Cir. 1999).....         | 3    |
| <i>United States v. Places</i> ,<br>462 U.S. 696 (1983).....                 | 9    |
| <i>United States v. Sanchez-Pena</i> ,<br>336 F.3d 431 (5th Cir. 2003) ..... | 3, 4 |
| <i>United States v. Sundby</i> ,<br>186 F.3d 873 (8th Cir. 1999) .....       | 3, 4 |
| <i>United States v. Winters</i> ,<br>600 F.3d 963 (8th Cir. 2010) .....      | 4    |
| <i>Virginia v. Moore</i> ,<br>553 U.S. 164 (2008).....                       | 13   |

## RULES

|                       |   |
|-----------------------|---|
| SUP. CT. R. 37.4..... | 1 |
|-----------------------|---|

## OTHER AUTHORITIES

|                                                                                                                                                                                                                                                                               |    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Central Florida High Intensity Drug<br>Trafficking Area: Drug Market Analysis<br>2011 at 1, 7, <i>available at</i> <a href="http://www.justice.gov/ndic/dmas/Central_Florida_DMA-2011(U).pdf">http://www.justice.gov/<br/>ndic/dmas/Central_Florida_DMA-2011(U).pdf</a> ..... | 11 |
| Florida Dep't of Highway Safety & Motor<br>Vehicles, Florida Highway Patrol, "K-9's<br>Join the Florida Highway Patrol," <i>available<br/>at</i> <a href="http://www.flhsmv.gov/fhp/CIP/VIP1.htm">http://www.flhsmv.gov/fhp/CIP/VIP1.htm</a> .....                            | 11 |

## TABLE OF AUTHORITIES—Continued

|                                                                                                                                                                                                                                                                             | Page |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Sir Walter Scott, <i>THE TALISMAN</i> 371 (1904),<br><i>available at</i> <a href="http://www.archive.org/stream/talismanwithintr00scotuoft#page/370/mode/2up">http://www.archive.org/stream/<br/>talismanwithintr00scotuoft#page/370/mode/2up</a> .....                     | 10   |
| U.S. Dep't of Justice, <i>NIJ Guide 601-00, Guide<br/>for the Selection of Drug Detectors for Law<br/>Enforcement Applications 21-22</i> (2000) .....                                                                                                                       | 11   |
| U.S. Dep't of Justice, National Drug<br>Intelligence Center, <i>National Drug Threat<br/>Assessment 2011 at 8-10</i> , <i>available at</i> <a href="http://www.justice.gov/ndic/pubs44/44849/44849p.pdf">http://<br/>www.justice.gov/ndic/pubs44/44849/44849p.pdf</a> ..... | 10   |
| Virginia State Police, <i>Annual Report: 2010<br/>Facts and Figures 46</i> , <i>available at</i> <a href="http://www.vsp.state.va.us/Annual_Report.shtm">http://<br/>www.vsp.state.va.us/Annual_Report.shtm</a> .....                                                       | 11   |



**STATEMENT OF THE IDENTITY, INTEREST  
AND AUTHORITY OF AMICI TO FILE<sup>1</sup>**

The Commonwealth of Virginia and Amici States Delaware, Hawaii, Kansas, Missouri, Nebraska, Oregon, Texas and Utah each have a vital state interest in combating the flow of illegal drugs, a problem of interstate (and international) proportions. Drug-detecting canines are one of the essential weapons in the States' arsenal to combat this illegal traffic. As argued by petitioner, Pet. 35-36, the Florida Supreme Court decision in *Harris v. State*, 71 So. 3d 756 (Fla. 2011), misinterprets this Court's precedents to draw into question, and then practically prohibit, the long-standing practice of utilizing trained canines to detect the presence of illegal drugs. The burdens erroneously placed on Florida's efforts to interdict illegal drugs will be borne not only by the citizens and law enforcement officials in the State of Florida but also by the citizens and law enforcement officials throughout the States, imposing significant harm upon them. A deep split of authority now exists among the circuits and state supreme courts regarding what evidence needs be shown to establish that a canine's alert is a reliable predicate for a search requiring probable cause.

---

<sup>1</sup> Pursuant to Supreme Court Rule 37.2(a), amici provided counsel of record for all parties timely notice of intent to file ten days prior to the due date of this amicus brief. Neither consent of the parties nor leave of court is required for the States to file an amicus brief. SUP. CT. R. 37.4.

Accordingly, the Commonwealth of Virginia and the other Amici States join in requesting that the Court grant the State of Florida's Petition for Certiorari in *Florida v. Harris*, No. 11-817 (Dec. 21, 2011), resolve the issue and, in doing so, provide a clear rule to guide law enforcement practices.

---

## ARGUMENT

As demonstrated in Florida's Petition for Certiorari, the Florida Supreme Court's decision in *Harris v. State* "imposes an evidentiary burden on the state which is based on a misconception of the federal constitutional requirement for probable cause."<sup>2</sup> 71 So. 3d at 775 (Canady, C.J., dissenting). Unsurprisingly, it also conflicts with the vast majority of jurisdictions to have considered what evidence is needed to establish a narcotics-detection dog's reliability for purposes of establishing probable cause.

### I. THE DECISION BELOW MISCONSTRUES THIS COURT'S PRECEDENTS AND DEEPENS A CONFLICT AMONG THE JURISDICTIONS.

Because the use of dogs as investigative tools is older than existence of professional police forces, "[t]he courts are not strangers to the use of trained dogs

---

<sup>2</sup> No independent and adequate state ground supports the Florida Supreme Court's decision in *Harris*. See Pet. 12 n.3.

to detect the presence of controlled substances. . . .” *Florida v. Royer*, 460 U.S. 491, 505 (1983); *see also United States v. Ludwig*, 10 F.3d 1523, 1528 (10th Cir. 1993) (stating “that bloodhound evidence ‘was looked upon with favor as early as the twelfth century’ and relating the declaration of Richard I of England: ‘Dress yonder Marquis [who had stolen the banner of England] in what peacock robes you will, disguise his appearance, alter his complexion with drugs and washes, hide himself amidst a hundred men; I will yet pawn my scepter that the hound detects him’” (quoting *Blair v. Commonwealth*, 204 S.W. 67, 68 (Ky. 1918))). As a predicate to a Fourth Amendment search, this Court and lower courts are agreed that a trained narcotics-detection “dog’s positive indication alone is enough to establish probable cause for the presence of a controlled substance if the dog is reliable.” *United States v. Sundby*, 186 F.3d 873, 876 (8th Cir. 1999) (citing *United States v. Owens*, 167 F.3d 739, 749 (1st Cir. 1999); *United States v. Kennedy*, 131 F.3d 1371, 1376-77 (10th Cir. 1997); *United States v. Berry*, 90 F.3d 148, 153 (6th Cir. 1996); and *United States v. Lingenfelter*, 997 F.2d 632, 639 (9th Cir. 1993)); *see Royer*, 460 U.S. at 506 (“[A] positive result [following a dog sniff] would have resulted in his justifiable arrest on probable cause.”); *see also United States v. Kitchell*, 653 F.3d 1206, 1223 (10th Cir. 2011) (same); *United States v. Sanchez-Pena*, 336 F.3d 431, 444 (5th Cir. 2003) (same). Nevertheless, “[c]ourts have not definitively addressed the issue of the quality or quantity of evidence necessary to establish a drug

detection dog's training and reliability." *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir. 1994); cf. *State v. Nguyen*, 726 N.W.2d 871, 876 (S.D. 2007) (collecting cases).

Where courts have addressed the issue, they have disagreed regarding the burden to be borne and the quantum of evidence necessary to lay the foundation for an officer's conclusion that there is probable cause to believe contraband is present when a trained narcotics-detection dog alerts. Most of the jurisdictions have concluded that "[a] drug detection dog is considered reliable when it has been trained and certified to detect drugs," *United States v. Winters*, 600 F.3d 963, 967 (8th Cir. 2010) (internal quotation marks omitted), and have demanded little to no evidence regarding what that training may have entailed. See *Sanchez-Pena*, 336 F.3d at 444, n.62 (stating that "evidence that the dog was certified was sufficient proof of his training to make an effective alert" to establish probable cause and stating that courts should not, even where the dog's reliability is challenged, "take up whether the dog's training was sufficient"); *Sundby*, 186 F.3d at 876 (holding that statements that "the dog has been trained and certified to detect drugs" that did "not give a detailed account of the dog's track record or education" was sufficient to establish probable cause); *Kennedy*, 131 F.3d at 1377 ("We decline to encumber the affidavit process by requiring affiants to include a complete history of a drug dog's reliability beyond the statement that the dog has been trained and certified

to detect drugs.”); *Berry*, 90 F.3d at 153 (“[T]o establish probable cause, the affidavit need not describe the particulars of the dog’s training. Instead, the affidavit’s accounting of the dog sniff indicating the presence of controlled substances and its reference to the dog’s training in narcotics investigations was sufficient to establish the dog’s training and reliability.”); *Diaz*, 25 F.3d at 396 (holding “that testimony is sufficient to establish a dog’s reliability in order to support a valid sniff,” and that reliability need not be proven “with training and performance records”); *United States v. Klein*, 626 F.2d 22, 27 (7th Cir. 1980) (holding that statements that a “dog ‘graduated from a training class in drug detection’” and “‘has proven reliable in detecting drugs and narcotics on prior occasions’” were sufficient evidence to establish probable cause); *Jones v. Commonwealth*, 670 S.E.2d 727, 733 (Va. 2009) (rejecting any requirement that “specific certifications [or] the results of field testing” be proffered to establish a drug-detection dog’s reliability).

However, some jurisdictions have suggested that evidence of more than the fact of training, or the fact of training coupled with testimony that the dog was reliable, must be proffered before a narcotics-detection dog’s alerting will be credited for purposes of establishing probable cause. See *United States v. Limares*, 269 F.3d 794, 798 (7th Cir. 2001) (holding that testimony to establish reliability “need not describe training methods or give the dogs’ scores



on their final exams,” and that “[i]t is enough if a dog is reliable in the field” as testified to by the dog’s handlers and proven by an “evidentiary hearing” that showed that the dog “ha[d] been right 62% of the time, enough to prevail on a preponderance of the evidence, and ‘probable cause’ is something less than a preponderance”); *see also State v. Foster*, 252 P.3d 292, 298 (Or. 2011) (“[I]n assessing whether the alert gave rise to probable cause, a court must consider the totality of the circumstances known to the officers, which typically will include such things as the dog’s training, certification, continued training and recertification, and performance in the field.”); *Nguyen*, 726 N.W.2d at 877 (“[T]rial courts making drug dog reliability determinations may consider a variety of elements, including such matters as the dog’s training and certification, its successes and failures in the field, and the experience and training of the officer handling the dog. Under the totality of circumstances, the court can then weigh each of these factors.”); *England v. State*, 19 S.W.3d 762, 768-69 (Tenn. 2000) (“the trial court, in making the reliability determination *may* consider such factors as: the canine’s training and the canine’s ‘track record,’ with emphasis on the amount of false negatives and false positives the dog has furnished. The trial court should also consider the officer’s training and experience with this particular canine.” (emphasis added)). However, in none of these cases did the courts hold, as did the Florida Supreme Court, that despite proof of ongoing training, certification, and other testimony regarding

reliability from the handler, the foundation of reliability was inadequate to establish probable cause and thus that the evidence uncovered by the dog's positive alert must be excluded. Nor has Amici States' research revealed another jurisdiction that presumes that trained and certified drug-detection dogs are not reliable enough to provide an officer probable cause to search when they alert, unless the State keeps and produces extensive evidence of each dog's reliability.

Yet this is precisely what the decision in *Harris* does. There the Florida Supreme Court observed that "[b]ecause a dog cannot be cross-examined like a police officer," in determining whether the officer enjoyed probable cause as a result of the "trained and certified" drug-detection dog alerting, it is the State's burden to show under a "totality of the circumstances" analysis "that the officer had a reasonable basis for believing the dog to be reliable" before conducting the search. 71 So. 3d at 758-59. The court concluded that this was necessary because the Fourth Amendment places "the burden . . . on the State to establish probable cause for a warrantless search." *Id.* at 759. For the Florida Supreme Court, "evidence that the dog has been trained and certified to detect narcotics, standing alone, is not [a] sufficient" foundation for the alert to afford Fourth Amendment's probable cause. *Id.* Rather, in each case,

the State must present the training and certification records, an explanation of the



meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability in being able to detect the presence of illegal substances within the vehicle.

*Id.*; but see *United States v. Delaney*, 52 F.3d 182, 188 (8th Cir. 1995) (“[T]here is *no legal requirement* that [an] affidavit specify the number of times the dog previously has sniffed out drugs” (emphasis added) (internal quotation marks omitted)). In reaching this conclusion, the Florida Supreme Court analogized the case to “situations where probable cause to search is based on the information provided by informants,” and opined that this tutorial was necessary to allow the trial court “to make an adequate determination as to the dog’s reliability.” 71 So. 3d at 759, 767, 771-72.

*Harris’s* approach to drug-detection dogs and probable cause is contrary to fundamental principles expounded by this Court. It is beyond dispute that, to establish probable cause, it must merely be shown that the officer had “‘a substantial basis’” on which to conclude that “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)). In concluding that the alert of a trained and certified drug-detection dog did not

provide the officer here a substantial basis on which to believe that there was a fair probability that drugs were in the defendant's vehicle, the Florida Supreme Court plainly misapprehended the probable cause inquiry.

Furthermore, this Court has long treated "a canine sniff by a well-trained narcotics-detection dog as 'sui generis,'" subject to a unique Fourth Amendment analysis not applicable to other sources of information. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (quoting *United States v. Places*, 462 U.S. 696, 707 (1983)). Just as a "canine sniff" by a "well-trained narcotics-detection dog" is not like a search by police officers, *see id.*, a dog alert is not like a statement by a criminal informant. Dogs, unlike humans, do not prevaricate. *See United States v. Meyer*, 536 F.2d 963, 966 (1st Cir. 1976) (noting that "a canine, when trained, reacts mechanically to certain cues in his environment," and that "[t]he same concerns that would be present in a human informant are simply not relevant here"). If the courts are to credit, as they often do, the trained senses of police officers—officers "engaged in the often competitive enterprise of ferreting out crime," *Arizona v. Evans*, 514 U.S. 1, 15 (1995)—to establish probable cause and act upon it, *see, e.g., Kentucky v. King*, 131 S. Ct. 1849 (2011), courts should be even more willing to credit the senses of trained and certified drug-detection dogs who can have no corrupt interest. *See Ludwig*, 10 F.3d at 1527 (holding that a "dog alert usually is at least as reliable as many other sources of probable

cause and is certainly reliable enough to create a 'fair probability' that there is contraband"). The absence of canine guile is a staple of literature. *See, e.g.,* Sir Walter Scott, *THE TALISMAN* 371 (1904), *available at* <http://www.archive.org/stream/talismanwithintr00scotuoft#page/370/mode/2up>.

## **II. THE DECISION BELOW THREATENS TO SIGNIFICANTLY UNDERMINE THE USE OF CANINES FOR DRUG INTERDICTION.**

This case also implicates long-standing law enforcement practices utilized to interdict the flow of illegal drugs. That being so, several undisputed realities of that traffic and its detection bear on this case. Situated as it is in the southeasternmost portion of the United States and acting as a hub for international travel, trade, and tourism, Florida is an involuntary host of much parasitic drug trafficking activity. *See* U.S. Dep't of Justice, National Drug Intelligence Center, National Drug Threat Assessment 2011 at 8-10, *available at* <http://www.justice.gov/ndic/pubs44/44849/44849p.pdf> (noting that Florida is "first in the nation for the number of indoor cannabis grow sites seized . . . and second for the number of cannabis plants eradicated" and noting that Florida is a primary point of entry for many international drug smuggling operations). To combat the flow of illegal drugs, the Florida State Highway Patrol, like the law enforcement agencies in many other states, has long deployed contraband interdiction teams, now numbering 26, each of which

utilize canines. Florida Dep't of Highway Safety & Motor Vehicles, Florida Highway Patrol, "K-9's Join the Florida Highway Patrol," *available at* <http://www.flhsmv.gov/fhp/CIP/VIP1.htm> (stating that "[t]he primary use of these units is the detection of illegal drugs"). In the five years preceding 2004, Florida Highway Patrol's canine teams "seized over \$18.5 million of illegal drugs and other contraband, resulting in 6,089 criminal cases with 12,987 arrests." *Id.* These efforts reduce the flow of illegal drugs, such as cocaine and methamphetamine, from Florida to other parts of the United States, including most Amici States. See Central Florida High Intensity Drug Trafficking Area: Drug Market Analysis 2011 at 1, 7, *available at* [http://www.justice.gov/ndic/dmas/Central\\_Florida\\_DMA-2011\(U\).pdf](http://www.justice.gov/ndic/dmas/Central_Florida_DMA-2011(U).pdf).

Like law enforcement officials in Florida, Amici States utilize canines to detect and interdict illicit drugs. This use results in a substantial number of seizures and arrests. For example, in 2010 alone, the Virginia State Police, which has 18 narcotic canine teams, utilized those teams in response to 718 calls, resulting in 118 arrests and 127 drug seizures. See Virginia State Police, Annual Report: 2010 Facts and Figures 46, *available at* [http://www.vsp.state.va.us/Annual\\_Report.shtm](http://www.vsp.state.va.us/Annual_Report.shtm). Furthermore, as of 2000, the U.S. Customs Service alone employed over 600 canine teams, which in a single year made over 9,000 seizures of drugs valued in excess of 3 billion dollars. U.S. Department of Justice, NIJ Guide 601-00, Guide for the Selection of Drug Detectors for

Law Enforcement Applications 21-22 (2000). As substantial as these numbers are, they represent only the tip of the proverbial iceberg, as they do not include the activities of local police and sheriff departments, many of whom have their own canine teams.

The Florida Supreme Court's decision in *Harris* undermines these vital law enforcement activities in two ways. First, it places substantial administrative burdens on the use of canines. As the Florida Supreme Court would have it, law enforcement, before availing itself of the benefit of a trained and certified narcotics-detection dog, must consider whether it can make myriad showings and thus introduce whatever evidence the dog's nose might point up. As *Harris* recites, "[t]he State's presentation of evidence that the dog is properly trained and certified is the beginning of the analysis." 71 So. 3d at 771. After that

the State must explain the training and certification so that the trial court can evaluate how well the dog is trained and whether the dog falsely alerts in training (and, if so, the percentage of false alerts). Further, the State should keep and present records of the dog's performance in the field, including the dog's successes (alerts where contraband that the dog was trained to detect was found) and failures ("unverified" alerts where no contraband that the dog was trained to detect was found). The State then has the opportunity to present evidence



explaining the significance of any unverified alerts, as well as the dog's ability to detect or distinguish residual odors. Finally, the State must present evidence of the experience and training of the officer handling the dog. Under a totality of the circumstances analysis, the court can then consider all of the presented evidence and evaluate the dog's reliability.

*Id.* By making the determination of probable cause dependent upon such an array of factors, with no clear guidance as to how much evidence of reliability is enough to justify an officer in searching in response to a drug-detection dog's alert, the Florida Supreme Court forgets that probable cause "is a practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Gates*, 462 U.S. at 231).

Second, the decision elicits a number of difficult questions for the courts applying these factors to the facts on the ground, questions the Florida Supreme Court provided no guidance for resolving. Informed by the concern that courts have clear guidance, this Court, "[i]n determining what is reasonable under the Fourth Amendment, [has] given great weight to the 'essential interest in readily administrable rules.'" *Virginia v. Moore*, 553 U.S. 164, 175 (2008) (quoting *Atwater v. Lago Vista*, 532 U.S. 318, 347 (2001)). The decision in *Harris* is bereft of this virtue, however,

and raises a number of difficult questions, such as: what constitutes a “false alert”;<sup>3</sup> do residual odors count as false alerts; what percentage of false alerts is “too many”; how long must records be kept; if records are destroyed, may the dog still be placed in the field; assuming records of past success and failure rates do not exist, are experienced dogs “grandfathered in” on the basis of their past work; whether the alert of a “rookie” dog—one who has not previously been in the field—could provide probable cause; and finally, whether a positive alert, the results of which were excluded by a finding of unreliability, be utilized to establish in the future that the dog is *now* reliable. The potential for varied and inconsistent applications raises serious questions regarding whether the “deterrent effect” outweighs the proportional “harm to the justice system.” See *Herring v. United States*, 555 U.S. 135, 147-48 (2008).

---



---

<sup>3</sup> The term “false alert” may better be termed a “non-productive final response.” Although a dog’s alert may not uncover contraband, the site on which the dog alerted often can be shown to have previously contacted contraband, and so still retains trace amounts. Thus, a narcotics-detection dog, as the dog in this case may have done, see *Harris*, 71 So. 3d at 761, may correctly alert at the presence of contraband, but the subsequent search reveal no amount for which a suspect could be charged. In any case, such an alert should ordinarily afford an officer the requisite probable cause.



## CONCLUSION

This Court should grant Florida's Petition for Certiorari to resolve the split between Florida and jurisdictions with workable rules that do not threaten national harm.

KENNETH T. CUCCINELLI, II  
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.  
Solicitor General of Virginia  
dgetchell@oag.state.va.us  
*Counsel of Record*

January 30, 2012

Respectfully submitted,

CHARLES E. JAMES, JR.  
Chief Deputy  
Attorney General

WESLEY G. RUSSELL, JR.  
Deputy Attorney General  
wrussell@oag.state.va.us

OFFICE OF THE  
ATTORNEY GENERAL  
900 East Main Street  
Richmond, Virginia 23219  
Telephone: (804) 786-7240  
Facsimile: (804) 371-0200

*Counsel for the  
Commonwealth of Virginia*

# **JOINT APPENDIX**

No. 11-817

Supreme Court, U.S.  
FILED

JUN 25 2012

**IN THE**  
**Supreme Court of the United States**

OFFICE OF THE CLERK

STATE OF FLORIDA,  
*Petitioner,*

*v.*

CLAYTON HARRIS,  
*Respondent.*

ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF FLORIDA

**JOINT APPENDIX**

GREGORY G. GARRE\*  
Special Assistant Attorney  
General

LATHAM & WATKINS LLP  
555 Eleventh Street, NW  
Suite 1000  
Washington, DC 20004  
(202) 637-2207  
gregory.garre@law.com

GLEN P. GIFFORD\*  
Assistant Public  
Defender

301 S. Monroe Street  
Suite 401  
Tallahassee, FL 32301  
(850) 606-8500  
glen.gifford@flpd2.com

*\*Counsel of Record*

**Petition for Certiorari Filed**  
**December 21, 2011**  
**Certiorari Granted March 26, 2012**

## TABLE OF CONTENTS

|                                                                             |                 |
|-----------------------------------------------------------------------------|-----------------|
| Docket Sheet, Liberty County .....                                          | JA-1 – JA-9     |
| Liberty County Sheriff's Department Property<br>Receipt, June 24, 2006..... | JA-10 – JA-12   |
| Information, June 29, 2006 .....                                            | JA-13 – JA-14   |
| Motion to Suppress Evidence, October 6,<br>2006 .....                       | JA-15 – JA-38   |
| Transcript of Motion to Suppress Hearing, October 12,<br>2006 .....         | JA-39 – JA-101  |
| State's Exhibit 1 Introduced at the Motion to<br>Suppress Hearing .....     | JA-102 – JA-116 |
| Judgment, November 15, 2006 .....                                           | JA-117 – JA-118 |
| Sentence, November 15, 2006 .....                                           | JA-119 – JA-121 |
| Sentencing Transcript, November 9,<br>2006 .....                            | JA-122 – JA-134 |

HONORABLE ROBERT HILL,  
CLERK OF COURT - LIBERTY

Report started 01/18/2007 11:20:54      Page: 1  
Defendant Case History Detail

NAME:       CLAYTON EARL HARRIS  
ADD1:       16748 SE RIVER STREET  
ADD2:  
C/S/Z:       BLOUNTSTOWN FL 32424  
D/L:        FL-H620-105-71-201-0  
RACE:       W  
SEX:        M  
DOB:        06/01/1971

\*\*\*\* CASE DATA \*\*\*\*

Case#:       06000042CFMA  
Filed W/Clerk:   06/26/2006  
Total Assessed:   \$655.00  
Paid:         \$     .00  
Bal Due        \$655.00  
Judge:         R SMITH  
Atty:          JUDY HALL

Phase/Seq

\*\*\*\* CHARGE/COURT DATA \*\*\*\*

-----  
P- 1 -893149 UNLWFUL POSS OF CHEMICALS  
PROS STATUS: SAME  
PROS ACTION: FILED  
PROS FILING DATE: 07/05/2006  
PROS DEC DATE: 07/05/2006

TRIAL: 11/09/2006  
DISP: ADJUDICA  
VERDICT:  
SEN DATE: 11/09/2006  
TRIAL TYPE: N

-----

P- 2 - 893131a2 MANUFACTURE OF  
CONTOLLED SUBSTANCE (METHAMPHE)

POS STATUS: SAME  
PROS ACTION: NO ACTIO  
PROS FILING DATE:  
PROS DEC DATE: 07/05/2006

| -DATE-     | PROGRESS OF CASE DOCKET                                 |
|------------|---------------------------------------------------------|
| 07/06/2006 | ARRAIGNMENT                                             |
| 08/17/2006 | CASE MANAGEMENT                                         |
| 09/14/2006 | CASE MANAGEMENT                                         |
| 10/12/2006 | MOTION HEARING                                          |
| 10/16/2006 | JURY TRIAL                                              |
| 11/09/2006 | SENTENCING                                              |
| 06/24/2006 | ARREST 1, 2                                             |
| 06/26/2006 | CASE FILED WITH CLERK                                   |
| 06/26/2006 | JUDGE R SMITH ASSIGNED                                  |
| 06/26/2006 | PROSECUTOR: RICHARD COMBS<br>ASSIGNED                   |
| 06/26/2006 | ARRAIGNMENT SET FOR<br>07/06/2006 AT 09:00 IN LCC/CRTM, |
| 06/26/2006 | JDG: R SMITH                                            |
| 06/26/2006 | ARREST TICKET                                           |
| 06/26/2006 | INCIDENT OFFENSE REPORT                                 |

|            |                                                  |
|------------|--------------------------------------------------|
| 06/26/2006 | FIRST APPEARANCE FORM                            |
| 07/05/2006 | FILED 1                                          |
| 07/05/2006 | NO ACTION 2                                      |
| 07/06/2006 | DEFENDANT PRESENT IN COURT                       |
| 07/06/2006 | ATTORNEY PRESENT IN COURT (JUDY HALL, P.D.)      |
| 07/06/2006 | PUBLIC DEFENDER APPOINTED                        |
| 07/06/2006 | PLEA OF OT GUILTY                                |
| 07/06/2006 | CASE MANAGEMENT REQUESTED                        |
| 07/06/2006 | CASE MANAGEMENT SET                              |
| 07/06/2006 | COURT REPORTER LINDA CUNNINGHAM PRESENT IN COURT |
| 07/06/2006 | ARRAIGNMENT DISPOSED                             |

-----

HONORABLE ROBERT HILL,  
CLERK OF COURT - LIBERTY

Report started 01/18/2007 11:20:54

Page: 2

Defendant Case History Detail

|            |                                               |
|------------|-----------------------------------------------|
| 07/06/2006 | CASE MANAGEMENT SET FOR 08/17/2006 AT 9:00 IN |
| 07/06/2006 | LCC/CRTRM, JDG: R SMITH                       |
| 07/10/2006 | DEFENSE ATTY: JUDY HALL ASSIGNED              |
| 07/14/2006 | SURETY BOND 311864411 POSTED 15000.00         |
| 08/04/2006 | NOTICE OF DISCOVERY                           |
| 08/16/2006 | ANSWER TO DEMAND FOR DISCOVERY AND DEMAND FOR |



|            |                                                             |
|------------|-------------------------------------------------------------|
|            | <b>NOTICE OF ALIBI</b>                                      |
| 08/17/2006 | <b>CASE MANAGEMENT DISPOSED</b>                             |
| 08/17/2006 | <b>DEFENDANT PRESENT IN COURT</b>                           |
| 08/17/2006 | <b>ATTORNEY PRESENT IN COURT (JUDY HALL, P.D.)</b>          |
| 08/17/2006 | <b>DEFENSE REQUESTED CONTINUANCE</b>                        |
| 08/17/2006 | <b>CASE MANAGEMENT SET</b>                                  |
| 08/17/2006 | <b>COURT REPORTER EUGENIA LAWRENCE PRESENT IN COURT</b>     |
| 08/17/2006 | <b>CASE MANAGEMENT SET FOR 09/14/2006 AT 09:00 IN</b>       |
| 08/17/2006 | <b>LCC/CRTRM, JDG: R SMITH</b>                              |
| 09/07/2006 | <b>MOTION TO COMPEL GUIDELINES SCORESHEET</b>               |
| 09/14/2006 | <b>CASE MANAGEMENT DISPOSED</b>                             |
| 09/14/2006 | <b>DEFENDANT PRESENT IN COURT</b>                           |
| 09/14/2006 | <b>ATTORNEY PRESENT IN COURT (JUDY HALL, P.D.)</b>          |
| 09/14/2006 | <b>DEFENSE REQUESTED CONTINUANCE</b>                        |
| 09/14/2006 | <b>PD FILED MOTION TO COMPEL; DEFENSE NEEDS TO SCHEDULE</b> |
| 09/14/2006 | <b>DEPOS; PLEA OFFER REJECTED</b>                           |
| 09/14/2006 | <b>MOTION TO SUPPRESS SET</b>                               |
| 09/14/2006 | <b>PRE TRIAL AND TRIAL SET</b>                              |
| 09/14/2006 | <b>COURT REPORTER EUGENIA LAWRENCE PRESENT IN COURT</b>     |
| 09/14/2006 | <b>MOTION HEARING SET FOR 10/12/2006 AT 01:00 IN</b>        |
| 09/14/2006 | <b>LCC/CRTRM, JDG: R SMITH</b>                              |

|            |                                                             |
|------------|-------------------------------------------------------------|
| 09/14/2006 | PRE TRIAL SET FOR 10/12/2006 AT 01:00 IN LCC/CRTRM,         |
| 09/14/2006 | JDG: R SMITH                                                |
| 09/14/2006 | JURY TRIAL SET FOR 10/16/2006 AT 09:00 IN LCC/CRTRM,        |
| 09/14/2006 | JDG: R SMITH                                                |
| 09/21/2006 | AMENDED ANSWER TO DEMAND FOR DISCOVERY FILED                |
| 10/02/2006 | NOTICE OF TAKING DESPOSITION                                |
| 10/02/2006 | NOTICE OF TAKING DESPOSITION                                |
| 10/09/2006 | MOTION TO SUPPRESS EVIDENCE                                 |
| 10/09/2006 | MOTION TO COMPEL DISCOVERY AND BRADY EVIDENCE               |
| 10/11/2006 | AMENDED ANSWER TO DEMAND FOR DISCOVERY FILED                |
| 10/12/2006 | MOTION HEARING DISPOSED                                     |
| 10/12/2006 | JURY TRIAL DISPOSED                                         |
| 10/12/2006 | "MOTION TO SUPPRESS"                                        |
| 10/12/2006 | DEFENDANT PRESENT IN COURT                                  |
| 10/12/2006 | ATTORNEY PRESENT IN COURT                                   |
| 10/12/2006 | DEFENSE AND STATE CALLED WITNESSES                          |
| 10/12/2006 | DEFENSE AND STATE MADE CLOSING ARGUMENTS                    |
| 10/12/2006 | COURT DENIED MOTION                                         |
| 10/12/2006 | PLEA OF NOLO CONTENDERE TO UNLAWFUL POSSESSION OF CHEMICALS |

|            |                                                               |
|------------|---------------------------------------------------------------|
| 10/12/2006 | STRAIGHT PLEA TO THE COURT                                    |
| 10/12/2006 | STATE APPROVED DEFENDANT'S<br>RIGHT TO APPEAL COURT'S         |
| 10/12/2006 | DENIAL OF MOTION TO<br>SUPPRESS                               |
| 10/12/2006 | COURT DEFERRED IMPOSITION<br>OF SENTENCE                      |
| 10/12/2006 | COURT REPORTER LINDA<br>CUNNINGHAM PRESENT IN<br>COURT        |
| 10/12/2006 | SENTENCING SET FOR 11/09/2006<br>AT 01:00 IN LCC/CRTRM,       |
| 10/12/2006 | JDG: R SMITH                                                  |
| 11/09/2006 | DEFENDANT ENTERED PLEA OF<br>NOLO CONTENDERE SEQ:1            |
| 11/09/2006 | DEFENDANT APPEARED PRES<br>W/ATTY FOR NO TRIAL TRIAL<br>SEQ:1 |
| 11/09/2006 | ADJUDICATED GUILTY SEQ: 1                                     |
| 11/09/2006 | DEFENDANT SENTENCED AS<br>FOLLOWS: - CNT 1                    |
| 11/09/2006 | MIN CONF-PRISON FOR 2 YRS –<br>CNT 1                          |
| 11/09/2006 | MAX CONF-PRISON FOR 2 YRS –<br>CNT 1                          |
| 11/09/2006 | DRUG OFFENDER PROBATION<br>FOR 5 YRS – CNT 1                  |

HONORABLE ROBERT HILL,  
CLERK OF COURT - LIBERTY

Report started 01/18/2007 11:20:54

Page: 3

Defendant Case History Detail

|            |                                                             |
|------------|-------------------------------------------------------------|
| 11/09/2006 | CREDIT FOR TIME SRV FOR 23<br>DYS - CNT 1                   |
| 11/09/2006 | DEFENDANT PRESENT IN<br>COURT                               |
| 11/09/2006 | ATTORNEY PRESENT IN COURT<br>(JUDY HALL, P.D.)              |
| 11/09/2006 | ADJUDGED GUILTY OF<br>UNLAWFUL POSS OF<br>CHEMICALS         |
| 11/09/2006 | COMMITTED TO DEPARTMENT<br>OF CORRECTIONS FOR 24<br>MONTHS  |
| 11/09/2006 | COURT RECOMMENDED<br>DEFENDANT TO BE PLACED IN              |
| 11/09/2006 | INSTITUTION TO RECEIVE<br>SUBSTANCE ABUSE TREATMENT         |
| 11/09/2006 | FOLLOWED BY 5 YEARS<br>PROBATION, FIRST 3 YEARS<br>WILL BE  |
| 11/09/2006 | DRUG OFFENDER PROBATION<br>AND THEN 2 YEARS REGULAR         |
| 11/09/2006 | PROBATION                                                   |
| 11/09/2006 | IF DEFENDANT IS NOT GIVEN<br>TREATMENT IN PRISON TO<br>HAVE |
| 11/09/2006 | AN EVALUATION FOR<br>TREATMENT UPON RELEASE;<br>ABSTAIN     |
| 11/09/2006 | FROM USE OF ILLEGAL DRUGS                                   |

|            |                                |
|------------|--------------------------------|
|            | AND ALCOHOL; RANDOM UA'S;      |
| 11/09/2006 | CURFEW 7:00 P.M. TO 7:00 A.M.; |
|            | TO REPORT TO JAIL              |
| 11/09/2006 | TOMORROW BY 5:00 P.M.          |
| 11/09/2006 | JAIL CREDIT OF 23 DAYS         |
| 11/09/2006 | SURETY BOND 311864411          |
|            | RELEASED 15000.00              |
| 11/09/2006 | ASSESSED \$385 FELONY          |
|            | STANDARD CC2 615.00 DUE        |
|            | 11/08/2011                     |
| 11/09/2006 | ASSESSED PD APPLICATION FEE    |
|            | 40.00 DUE 11/08/2011           |
| 11/15/2006 | SENTENCING DISPOSED            |
| 11/15/2006 | JUDGMENT AND SENTENCE          |
| 11/15/2006 | SENTENCING SCORESHEET          |
| 11/15/2006 | RESTITUTION ORDER              |
| 11/15/2006 | VICTIM/PERSONAL                |
|            | REPRESENTATIVE                 |
|            | INFORMATION                    |
| 11/20/2006 | CASE CLOSED                    |
| 11/21/2006 | SPLIT ORDER OF DRUG            |
|            | OFFENDER PROBATION             |
| 12/05/2006 | APPEAL DATE SET TO 12/05/2006  |
| 12/05/2006 | NOTICE OF APPEAL               |
| 12/05/2006 | MOTION FOR ORDER OF            |
|            | INDIGENCY                      |
| 12/05/2006 | MOTION FOR ORDER DIRECTING     |
|            | COURT REPORTER TO              |
|            | TRANSCRIB                      |
| 12/05/2006 | NOTES                          |
| 12/05/2006 | JUDICIAL ACTS TO BE            |
|            | REVIEWED                       |
| 12/05/2006 | *NOTICE OF APPEAL AND FILE     |

|            |                                                            |
|------------|------------------------------------------------------------|
|            | TRANSFERRED TO APPEALS                                     |
| 12/05/2006 | CLERK*                                                     |
| 12/08/2006 | ORDER OF INDIGENCY                                         |
| 12/08/2006 | ORDER DIRECTING COURT<br>REPORTER TO TRANSCRIBE<br>NOTES   |
| 12/15/2006 | AMENDED MOTION FOR ORDER<br>DIRECTING COURT REPORTER       |
| 12/15/2006 | TO TRANSCRIBE NOTES                                        |
| 12/20/2006 | AMENDED ORDER DIRECTING<br>COURT REPORTER TO<br>TRANSCRIBE |
| 12/20/2006 | NOTES                                                      |
| 12/20/2006 | TRANSCRIPT OF SENTENCING<br>11-9-06                        |
| 12/21/2006 | DCA LETTER OF<br>ACKNOWLEDGMENT                            |

NO MORE DOCKET ENTRIES FOR CASE  
#06000042CFMA



LIBERTY COUNTY SHERIFF'S DEPARTMENT  
PROPERTY RECEIPT

---

DATE 06/24/06

VICTIM: STATE OF FLORIDA/LIBERTY  
COUNTY

CASE NO. 06-06-2672

☐ STOLEN      ☐ FOUND PROPERTY  
☐ PROPERTY OF DECEASE  
☐ RECOVERED ☒ EVIDENCE  
☐ EVIDENCE FOR LAB

---

☐ RECOVERED      ☐ RETURN

---

OFFENSE DATE: 06/24/06  
OFFENSE POSSESSION OF LISTED  
CHEMICALS PSEUDO/EPHEDRINE,  
ATTEMPTED MANUFACTURE OF  
METHAMPHETAMINE

---

ADDRESS WHERE PROPERTY  
IMPOUNDED/RECOVERED  
S.R. 20 AT FREEMAN RD.

DATE AND TIME IMPOUNDED  
06/24/06 1630HRS

---

OWNER'S NAME:  
HARRIS, CLAYTON EARL



ADDRESS  
16748 S.E. RIVER STREET  
BLOUNSTOWN, FL 32324

PHONE NO.  
850-209-6988

---

LOCATION WHERE PROPERTY STORED:  
EVIDENCE LOCKER

BIN#

IF WRECKED USED \_\_ NAME OF COMPANY

| ITEM # | * P.F.P | QUANTITY<br>WEIGHT/<br>COUNT | DESCRIPTION<br>(include all identifying<br>marks)              |
|--------|---------|------------------------------|----------------------------------------------------------------|
| 1      |         | 1                            | KLEAN STRIP<br>BRAND 1 GALLON<br>CONTAINER OF<br>MURIATIC ACID |
| 2      |         | 2                            | HEET BRAND GAS<br>LINE ANTI-FREEZE<br>AND WATER<br>REMOVER     |
| 3      |         | 8                            | BOXES OF 1,000<br>COUNT MATCHES,<br>PUBLIX BRAND               |
| 4      |         | 300                          | PSEVDO/<br>EPHEDRINE PILLS                                     |
| 5      |         | 1                            | STYROFOAM PLATE<br>CONTAINING A                                |

|  |  |  |                                          |
|--|--|--|------------------------------------------|
|  |  |  | COFFEE FILTER<br>WITH IODINE<br>CRYSTALS |
|--|--|--|------------------------------------------|

\*Process for Prints

Name of person Evidence | Property Seized From  
HARRIS, CLAYTON EARL

### CHAIN OF CUSTODY

THE FOLLOWING INDIVIDUALS HAVE HAD  
CUSTODY OF THE ITEMS LISTED ABOVE:

\_\_\_\_\_

SIGNATURE OF SEIZING

OFFICER:       /s/      

|                                                            |                                                                                         |
|------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| RECEIVED BY: _____<br>SIGNATURE: _____<br>DATE/TIME: _____ | PROPERTY RECEIVED<br>SEALED YES( ) NO( )<br>SEAL BROKEN BY: _____<br>RESEALED BY: _____ |
| RECEIVED BY: _____<br>SIGNATURE: _____<br>DATE/TIME: _____ | PROPERTY RECEIVED<br>SEALED YES( ) NO( )<br>SEAL BROKEN BY: _____<br>RESEALED BY: _____ |
| RECEIVED BY: _____<br>SIGNATURE: _____<br>DATE/TIME: _____ | PROPERTY RECEIVED<br>SEALED YES( ) NO( )<br>SEAL BROKEN BY: _____<br>RESEALED BY: _____ |

IN THE CIRCUIT COURT OF THE  
SECOND JUDICIAL CIRCUIT, IN  
AND FOR LIBERTY COUNTY,  
FLORIDA

STATE OF FLORIDA      CASE NO. 06-042CFA

vs.

**\*\*INFORMATION\*\***

Clayton E. Harris  
W/M, 06/01/1971  
SSN: 591-40-7549  
16748 SE River Street  
Blountstown, FL 32424

Defendant(s).

\_\_\_\_\_  
INFORMATION FOR:

Count    I    UNLAWFUL    POSSESSION    OF  
CHEMICALS (F2)

\_\_\_\_\_  
IN THE NAME OF AND BY THE AUTHORITY OF  
THE STATE OF FLORIDA:

WILLIAM N. MEGGS, State Attorney for the  
Second Judicial Circuit of the State of Florida,  
charges that in Liberty County, the above named  
defendant(s):

On or about June 24, 2006, did unlawfully possess a  
listed chemical Pseudo/Ephedrine knowing or having  
reasonable cause to believe that the listed chemical  
will be used to unlawfully manufacture a controlled

substance, Methamphetamine, contrary to Section 893.149(1)(A), Florida Statutes.

STATE OF FLORIDA  
COUNTY OF LIBERTY

WILLIAM N. MEGGS, STATE ATTORNEY  
SECOND JUDICIAL CIRCUIT

/s/

Richard H. Combs  
Designated Assistant State Attorney

The foregoing instrument was acknowledged before me on June 29, 2006, by Richard H. Combs Designated Assistant State Attorney by William N. Meggs, State Attorney for the Second Judicial Circuit of the State of Florida, who is known to me and did take an oath stating good faith in instituting the prosecution and certifying that testimony was received under oath from the material witness or witnesses for the offense pursuant to F.R.Cr.P. 3.140(g).

/s/

NOTARY PUBLIC  
Angela Seymour  
MY COMMISSION # DD183607 EXPIRES  
February 12, 2007  
BONDED THRU TROY FAIN INSURANCE, INC.

IN THE CIRCUIT COURT IN AND FOR LIBERTY  
COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO. 06-42CFA

V.

CLAYTON HARRIS,  
Defendant

MOTION TO SUPPRESS EVIDENCE

The defendant through the undersigned counsel, pursuant to Rule 3.190, Fla.R.Crim.P., moves this court to suppress evidence seized because it was found pursuant to an illegal search of the defendant's vehicle without probable cause, and as grounds therefore states:

1. On June 24, 2006, Deputy Wheetley stated that he stopped the defendant because he had an expired tag. Because the defendant was nervous and had an open container, the deputy asked for consent to search. When the defendant refused consent to search, Deputy Wheetley did a dog sniff of the vehicle. The dog alerted to the door handle of the truck. The search revealed 200+ pseudoephedrine pills in a plastic bag under the seat and 8 boxes of small kitchen matches wrapped in cellophane in the cab of the truck. Plastic bottles of muriatic acid and Heet antifreeze were found in the tool box in the bed of the truck. (attachment 1)

2. A dog sniff only provides probable cause for a search if the dog alerts to an illegal substance currently inside the vehicle. The facts establish that Aldo did not alert to any substance currently inside the vehicle because he is not conditioned to alert to either the pseudoephedrine or the matches that were found inside the vehicle.

3. The facts prove that Aldo made a "false alert" either due to canine error or a residual odor. Aldo could not have sniffed contraband inside the vehicle. No man or dog is free from making mistakes.

4. Probable cause for a search can only be established when the dog sniffs contraband that is presently in the vehicle. Under the facts of this particular case, it has been established that Aldo did not alert to a current odor within the vehicle.

5. If Aldo is not properly certified and conditioned as a dog which is expert in sniffing drugs, the State cannot make a prima facie showing of probable cause. However, even if Aldo were properly certified and conditioned, the facts of this case establish that it was a false alert.

### **MEMORANDUM OF LAW**

This was a false alert. Aldo was not conditioned to alert to pseudoephedrine or matches wrapped in cellophane. Since these were the only items of evidence found in the cab of the truck, it is established that the dog did not alert to contraband in

the vehicle. A dog is rewarded for a positive alert and understandably wants to get his reward. If Aldo detected a residual odor, it did not give probable cause that there was contraband presently in the vehicle. Aldo is not trained or certified to distinguish a dead scent from a current scent. In all the dog sniff cases that counsel has reviewed, contraband which the dog has been trained to detect has been found so it was possible that the dog alerted to a current odor. In this case, it was not possible that the dog alerted to a current odor of contraband in the vehicle.

The State must make a prima facie showing that a canine alert constituted probable cause. There is a conflict between whether the State only has to show that the dog has been certified and trained at some time in the past, or whether the State must show additional evidence that the dog's training is up to date and the dog has the ability to produce results in the field. In *State v. Matheson*, 870 So.2d 8 (Fla. 2d DCA 2003), the Court found that past certification alone is insufficient to prove that a particular dog is up to date in his training and able to actually conduct successful drug sniffs in the field (see attachment 2). The Fourth and Fifth District courts have found that certification alone is sufficient to make a prima facie case and that whether the dog is up to date and has a good "track record" goes to the credibility of the canine witness but not to the admissibility of the evidence. *Coleman v. State*, 911 So. 2d 259 (Fla. 5th DCA 2005); *State v. Laveroni*, 910 So.2d 333 (Fla. 4th DCA 2005). Review of *Matheson* was denied by the Florida Supreme Court and the United States Supreme Court. Although conflict was certified in



Coleman, counsel has been unable to find that it is pending review.

In this case, the State may not be able to establish the required certification to establish a prima facie showing of Aldo's reliability. However, even if the State did establish a prima facie showing of Aldo's reliability, the facts prove that in this particular case Aldo was wrong. All the drug sniff cases address situations where a subsequent search revealed that there was contraband in the vehicle which the dog had been trained to detect. The instant case is a totally different factual situation: there was no contraband in the vehicle which the dog had been trained to detect. This was a false alert.

WHEREFORE, the Defendant respectfully requests that this Court suppress the evidence found as a result of a dog sniff in that the evidence proves that Aldo did not alert to any contraband in the vehicle.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand delivered to Richard Combs, Assistant State Attorney, this 6th day of October, 2006.

Respectfully submitted,

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

*/s/*

JUDITH HALL  
Fla. Bar No. 187786  
Asst. Public Defender  
301 South Monroe Street  
Tallahassee FL 32301  
(850) 606-8513  
ATTORNEY FOR DEFENDANT

## PROBABLE CAUSE

TO: FIRST APPEARANCE MAGISTRATE

Defendant HARRIS, CLAYTON EARL

Date Arrested 06/24/06

CHARGES: POSSESSION OF LISTED CHEMICALS  
PSEUDO/EPHEDRINE, ATTEMPTED  
MANUFACTURE OF METHAMPHETAMINE

### SUMMARY OF OFFENSES AND PROBABLE CAUSE AFFIDAVIT

The above-named defendant was arrested for the following reasons

ON 06/24/06 AT 1608 HRS. I CONDUCTED A TRAFFIC STOP ON A GREEN GMC TRUCK IN REFERENCE TO AN EXPIRED TAG ON S.R. 20 WESTBOUND AT FREEMAN ROAD. UPON MAKING CONTACT WITH THE DRIVER CLAYTON EARL HARRIS I ADVISED HIM OF THE REASON FOR THE STOP. HARRIS STATED THAT HE KNEW THAT HIS TAG WAS EXPIRED. WHILE AT THE PASSENGER SIDE WINDOW I NOTICED THAT HARRIS WAS VISIBLY NERVOUS DUE TO THE FACT THAT HE WAS SHAKING AND THE RAPID RISE AND FALL OF HIS CHEST. THERE WAS ALSO AN OPEN CAN OF BUD LIGHT IN THE CUP HOLDER. I THEN ASKED HARRIS FOR CONSENT TO SEARCH HIS VEHICLE AT WHICH TIME HE DENIED CONSENT. I THEN ADVISED HARRIS THAT I WOULD BE DEPLOYING MY K-9 TO CONDUCT A FREE AIR SNIFF TO EXTERIOR

OF HIS VEHICLE. WHILE I WAS DEPLOYING K-9 "ALDO" I NOTICED THAT HARRIS WAS ON HIS CELL PHONE AND MOVING AROUND IN THE CAB AREA OF HIS VEHICLE. DURING THE FREE AIR SNIFF OF HARRIS' VEHICLE K-9 "ALDO" SHOWED A POSITIVE ODER RESPONSE TO THE DRIVERS DOOR HANDLE OF THE SUSPECT VEHICLE. I THEN PLACED K-9 "ALDO" BACK INTO MY PATROL VEHICLE. I THEN MADE CONTACT WITH HARRIS AND INFORMED HIM OF THE POSITIVE ODOR RESPONSE AND THAT THE RESPONSE GIVES ME PROBABLE CAUSE TO SEARCH HIS VEHICLE. HARRIS WAS THEN INSTRUCTED TO EXIT THE VEHICLE AT WHICH TIME I CONDUCTED A PAT SEARCH OF HARRIS. BEFORE I STARTED THE SEARCH OF THE VEHICLE I ASKED HARRIS IF THERE WAS ANY THING IN THE TRUCK ILLEGAL AND HARRIS STATED "NOT THAT I KNOW OF". I THEN ASKED HARRIS TO STEP TO THE REAR OF THE TRUCK SO I COULD CONDUCT THE SEARCH. I STARTED THE SEARCH ON THE DRIVERS SIDE OF THE VEHICLE. DURING THE SEARCH OF THE DRIVERS SIDE I DISCOVERED A WHITE PLASTIC WALGREENS BAG UNDER THE DRIVERS SEAT RAPPED IN A SHIRT THAT CONTAINED WELL OVER 200 PSEUDO/EPHEDRINE PILLS. THE PILLS WERE LOOSE AND THERE WERE PIECES OF FOIL FROM THE BLISTER PACKS. I ASKED HARRIS WHAT THE PILLS WERE AND HE STATED "EPHEDRINE". I THEN WENT TO THE PASSENGER SIDE AND DISCOVERED A WHITE PLASTIC BAG UNDER SOME CLOTHES THAT

CONTAINED 8 BOXES OF PUBLIX BRAND MATCHES. EACH OF THE BOXES CONTAINED 1,000 MATCHES WHICH TOTALED 8,000 MATCHES. I THEN PLACED HARRIS UNDER ARREST FOR POSSESSION OF LISTED CHEMICALS PSEUDO/EPHEDRINE AND READ HIM HIS MIRANDA RIGHTS. I THEN CONDUCTED A SEARCH OF THE PASSENGER SIDE OF THE TOOL BOX AT WHICH TIME I DISCOVERED A CLEAR PLASTIC BOTTLE LABELED MURIATIC ACID. AT THAT POINT I CONTACTED LT. SHULER TO BE EN ROUTE TO MY LOCATION. WHEN LT. SHULER ARRIVED WE CONDUCTED A THOROUGH SEARCH OF THE TRUCK AND DISCOVERED TWO BOTTLES OF HEET ANTIFREEZE/WATER REMOVER IN THE TOOL BOX ON THE DRIVERS SIDE AND A RED STYROFOAM PLATE INSIDE OF A GREEN LATEX GLOVE THAT CONTAINED IODINE. THE EVIDENCE WAS THEN PHOTOGRAPHED AND SECURED. LT. SHULER THEN TRANSPORTED HARRIS TO THE LIBERTY COUNTY SHERIFF'S OFFICE. THE TRUCK WAS THEN SECURED AND REMOVED BY BRISTOL 66 TOWING.

The preceding is true to the best of my present knowledge or belief:

Signature:   /s/   Agency: LCSO

NOTARY/ASA   /s/  

Notarization: Sworn & Subscribed to me this 24<sup>th</sup> day  
of JUNE 12006

My commission expires FTBLEO

ORDER: THIS CAUSE coming before me as a First Appearance Magistrate, and having reviewed the preceding Affidavit, find:

\_\_\_\_ Probable cause sufficient;

\_\_\_\_ Probable cause not sufficient and unless corrected within seventy-two hours, the defendant shall be released on his own recognizance.

Bond Amount Requested

JUDGE'S SIGNATURE

870 So. 2d 8, \*; 2003 Fla. App. LEXIS 11593 \*\*;  
28 Fla. L. Weekly D 1791

LEXSEE 870 SO.2D 8

GARY ALAN MATHESON, Appellant, v. STATE  
OF FLORIDA, Appellee.

Case No. 2D00-1611

COURT OF APPEAL OF FLORIDA, SECOND  
DISTRICT

870 So. 2d 8; 2003 Fla. App. LEXIS 11593; 28 Fla.  
L. Weekly D 1791

August 1, 2003, Opinion Filed

SUBSEQUENT HISTORY: Released for Publication  
May 4, 2004. Rehearing denied by *Matheson v. State*,  
2004 Fla. App. LEXIS 13380 (Fla. Dist. Ct. App. 2d  
Dist., Mar. 5, 2004)

Review granted by *State v. Matheson*, 880 So. 2d  
1212, 2004 Fla. LEXIS 1362 (Fla., 2004) Review  
dismissed by *State v. Matheson*, 896 So. 2d 748, 2005  
Fla. LEXIS 381 (Fla., 2005)

US Supreme Court certiorari denied by, Motion  
granted by *Fla. v. Matheson*, 126 S. Ct. 545, 163 L. Ed  
2d 499, 2005 U.S. LEXIS 8178 (U.S., Oct. 31, 2005)

PRIOR HISTORY: [\*\*1] Appeal from the Circuit  
Court for Hillsborough County; Barbara Fleischer,  
Judge.



**DISPOSITION:** Reversed and remanded

**COUNSEL:** James Marion Moorman, Public Defender, and Celene Humphries, Special Assistant Public Defender, Bartow, for Appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Susan M. Shanahan, Assistant Attorney General, Tampa, for Appellee.

**JUDGES:** NORTHCUTT, Judge. FULMER and STRINGER, JJ., Concur.

**OPINION BY:** NORTHCUTT

**OPINION:** [\*10] NORTHCUTT, Judge.

Gary Alan Matheson maintains the State failed to prove that an alert by Razor, a narcotics detection dog in service to the Hillsborough County Sheriff's Office, furnished probable cause to search his vehicle. He advanced that position during his prosecution for drug offenses in a motion to suppress the contraband discovered and seized during the search. When the circuit court denied the motion, Matheson pleaded no contest to three counts of possessing a controlled substance and one count of possessing drug paraphernalia. He reserved his right to appeal the denial of his dispositive [\*\*2] motion to suppress. We reverse.

#### PROCEEDINGS BELOW

At the suppression hearing it was related that

in May 1999 Razor was called upon to sniff Matheson's car after deputies stopped Matheson for a traffic infraction. During the traffic stop the deputies had made what they described as a routine request for permission to search Matheson's car. Matheson had declined; hence, the deputy called for Razor's assistance.

The State offered the testimony of Razor's handler, Deputy Greco, who recounted that he arrived at the scene as another deputy was writing Matheson a traffic citation. Deputy Greco testified that he followed his normal routine by taking Razor to the driver's side door of Matheson's car and quickly walking the dog around the car in a clockwise direction. Razor did not alert on this first pass. Deputy Greco then walked Razor slowly around the car, allowing him to linger at the "seams." This time, Razor scratched and bit at the edge of the car's hatchback, which Deputy Greco recognized as Razor's alert behavior.

Deputy Greco advised his colleagues that Razor had alerted. They then entered Matheson's car and searched it. In the rear of the car they discovered a bag containing [\*\*3] drug paraphernalia, including syringes and spoons. In the glove compartment the deputies found hydrocodone tablets, morphine tablets, and methamphetamine.

On the evening that Deputy Greco walked Razor around Matheson's car, he had been a canine handler for about twenty-one months. He testified that he had taken training both in canine patrol

handling and in narcotics detection. He and Razor had been assigned to each other since both began their services in canine patrol in August 1997. Prior to Razor's sniff of Matheson's car, he had been certified to detect marijuana, cocaine and heroin. He subsequently was certified to detect methamphetamine.

On cross-examination, Deputy Greco acknowledged that he had not maintained a record of Razor's false alert rate. In fact, he often left the scene of a sniff after advising deputies that Razor had alerted, and thus never learned whether the alert had led to the discovery of contraband.

At the conclusion of Deputy Greco's testimony, the State rested. The circuit court agreed that the State had made a prima facie showing that the search of Matheson's car was supported by probable cause.

The defense then presented the testimony of Razor's trainer, [\*\*4] Sergeant Olive. He testified that Razor completed a thirty-day course of training by the Hillsborough County Sheriff's Office in October 1997 [\*II] and a one-week program under the auspices of the United States Police Canine Association in June 1998.

During questioning about the specifics of the HCSO and USPCA training regimens, Sergeant Olive testified that Razor had received no training to discourage him from alerting to "dead scents," those being residual odors of drugs that are no longer present. Sergeant Olive also confirmed that the

Sheriff's Office did not maintain records of Razor's success rate. When explaining this, he maintained that it would be impossible to assess a dog's reliability "in the street" because the dog might alert on dead scents. Sergeant Olive asserted that he would not consider an alert on a dead scent to be a false alert because the dog had done what he was conditioned and certified to do, i.e., alert to the odor of contraband.

The defense submitted the expert testimony of Dr. Dan Craig, a veterinarian and animal behavior specialist whose background included extensive consultation with the United States military and other agencies regarding their detection [\*\*5] dog programs. Dr. Craig testified that the HCSO training procedures used with Razor were too simplistic to make him reliable at detecting narcotics for six reasons. First, Razor received inadequate training for searching vehicles. Second, Razor was not trained with small quantities of drugs. Third, training officers failed to plant novel odors during Razor's training searches. Fourth, Razor was not subject to controlled negative testing, in which all objects or locations have no drugs present. Dr. Craig said that this type of testing indicates a false response rate and reveals whether the handler or the dog is guessing. He added that preventing the handler from knowing whether drugs will be present during a training exercise reveals whether the handler is consciously or unconsciously prompting the dog to alert. Dr. Craig asserted that this type of testing is essential and should be performed periodically on a random basis. Fifth, Razor was not given extinction training, which

would have discouraged him from alerting to common items that are sometimes associated with drugs, such as plastic bags used for packaging. Sixth, there was no evidence that Razor's training included "stimulus [\*\*6] generalization," which conditions a dog trained on one class of drugs to detect all drugs in that class.

Addressing Razor's USPCA certification, Dr. Craig testified that there were a number of flaws in the USPCA certification procedures that rendered this certification insufficient evidence of Razor's reliability. First, the USPCA did not perform controlled negative testing. Second, the USPCA limited the dog's search time to ten minutes, which is shorter than "real world" searches. Third, the USPCA required only a seventy percent proficiency, which Dr. Craig considered insufficient. Fourth, the USPCA failed to focus on the dog's ability to detect narcotics, but analyzed the ability of the dog and handler as a team. Therefore, according to Dr. Craig, the USPCA could not truly certify the dog's individual ability to detect narcotics. Fifth, Razor was not certified to detect methamphetamine, and his training did not prepare him to reliably detect this substance.

## DISCUSSION

Under the *Fourth Amendment*, a law enforcement officer may not search a place within the ambit of a person's legitimate expectation of privacy unless the officer has probable cause to believe that a search of that [\*\*7] place at that time will uncover evidence of a crime. See *Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002), cert. denied, 539 U.S. 919, 156 L.



*Ed. 2d 137, 123 S. Ct. 2278 [\*12] (2003)*. Whether applying for a search warrant beforehand or justifying a warrantless search after the fact, it is the State's burden to show that the search will be or was justified by probable cause. See *Doorbal v. State*, 837 So. 2d 940, 952 (Fla.), cert. denied, 123 S. Ct. 2647 (2003); *Doctor v. State*, 596 So. 2d 442, 445 (Fla. 1992).

In this case the State contends that it met its burden based on the testimony of Deputy Greco. It maintains that by proving Razor was trained and certified, it established prima facie that Razor's alert gave the deputies probable cause to believe Matheson's car contained contraband. This position finds support in several courts, including the United States Sixth Circuit Court of Appeals and the Georgia Court of Appeals. Those courts have held that a certification that a dog has been trained is prima facie proof of the dog's reliability which then may be rebutted by the presentation of evidence regarding the dog's [\*\*8] performance or training. See *United States v. Hill*, 195 F.3d 258, 273 (6th Cir. 1999); *United States v. Diaz*, 25 F.3d 392, 395 (6th Cir. 1994); *Warren v. State*, 254 Ga. App. 52, 561 S.E.2d 190, 194-95 (Ga. Ct. App. 2002); *Dawson v. State*, 238 Ga. App. 263, 518 S.E.2d 477, 481 (Ga. Ct. App. 1999). "Although the dog's 'credibility' may be undermined by evidence of its lack of training or past unreliability, the ultimate determination as to whether the dog is sufficiently reliable to support a determination of probable cause is for the trial court as the trier of fact." *Dawson*, 518 S.E.2d at 480.

When the evidence presented, whether

testimony from the dog's trainer or records of the dog's training, establishes that the dog is generally certified as a drug detection dog, any other evidence, including the testimony of other experts, that may detract from the reliability of the dog's performance properly goes to the "credibility" of the dog. Lack of additional evidence, such as documentation of the exact course of training, similarly would affect the dog's reliability. As with the admissibility of evidence [\*\*9] generally, the admissibility of evidence regarding a dog's training and reliability is committed to the trial court's sound discretion.

Diaz, 25 F.3d at 394.

"Prima facie" means that the proponent has fulfilled his duty to produce evidence and there is sufficient evidence for the court to consider the issue. Charles W. Ehrhardt, Florida Evidence § 301.2 (2002). Thus, the proposition advanced by the State is that the fact that a dog has been trained and certified to detect narcotics, standing alone, justifies an officer's reliance on the dog's alert to establish probable cause to search. But our review of the record and of pertinent literature convinces us that this is not enough.

Law enforcement use of narcotics detection dogs has become commonplace. And, generally, a trained



dog's alert on a vehicle may constitute probable cause to search. See *State v. Russell*, 557 So. 2d 666, 667 n.1 (Fla. 2d DCA 1990); *Denton v. State*, 524 So. 2d 495, 498 (Fla. 2d DCA 1988). The reason, of course, is the dog's keen sense of smell.

A dog's nose is uniquely equipped to detect the faintest of odors. Dogs possess potentially billions of [<sup>\*\*10</sup>] chemical receptors called olfactory cells. These receptors are located among large supports inside the dog's nose named turbinate bones. Turbinate bones form numerous cylindrical passages that allow air exposure to millions more cells than is possible with simple tubular nasal passages, such as those found in human beings. Laid out, the surface area of these cells would cover a space the area of the skin on the dog's body. [<sup>\*13</sup>] In comparison, the surface area of human olfactory cells would cover no more than a postage stamp. The effect of the dog's olfactory cells is not entirely clear. Some experts claim the result is an enhanced ability to detect minute levels of odorous material. Others assert that a canine's strength lies in its ability to discriminate among odors. Scientists supporting the discrimination theory believe that each olfactory receptor responds to a different odor; the more receptors, the greater the power to distinguish between scents. The answer most likely lies somewhere

between the two opposing theories. Little doubt exists that dogs have the ability to detect the smallest traces of odors and to perceive these scents much better than human beings.

\*\*\*

Robert [\*\*11] C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 *Ky. L.J.* 405, 408-09 (1997).

Certainly, the olfactory superiority of dogs recommends their use by law enforcement. But when determining probable cause to search, it can also be a weakness.

Many times the possibility of a false alert will be overlooked by a handler as will the dog's inability to differentiate between a "live" scent and a "dead" scent. Each dog will also vary in its ability to ignore detractors and masking agents[.]

Max A. Hansen, *United States v. Solis: Have the Government's Supersniffers Come Down With a Case of Constitutional Nasal Congestion?*, 13 *San Diego L. Rev.* 410, 416 (1976). Indeed, in this case Razor's trainer acknowledged the tendency of narcotics detection dogs to alert on the residual odors of drugs that are no longer present.

This underscores one of three central reasons why the fact that a dog has been trained, standing

alone, is not enough to give an officer probable cause to search based on the dog's alert. Razor's trainer acknowledged that a trained dog, doing what he has been conditioned to do, imparts to the officer [\*\*12] merely that he detects the odor of contraband. To be sure, as the trainer maintained, this may not be a false alert when assessing the success of the dog's conditioning. But for *Fourth Amendment* purposes it is neither false nor positive. The presence of a drug's odor at an intensity detectable by the dog, but not by the officer, does not mean that the drug itself is present. An officer who knows only that his dog is trained and certified, and who has no other information, at most can only suspect that a search based on the dog's alert will yield contraband. Of course, mere suspicion cannot justify a search. See *Coney v. State*, 820 So. 2d 1012, 1014 (Fla. 2d DCA 2002). It follows that proof of facts that could justify only a suspicion cannot prima facie establish probable cause.

Another problem with predicating a finding of probable cause solely on the fact that a dog has been trained stems from inherent variables in the training endeavor. Although we commonly refer to the "training" of dogs, manifestly they are not trained in the sense that human beings may be trained. It is not a process of imparting knowledge and skills that dogs want or need. However much we dog [\*\*13] lovers may tend to anthropomorphize their behavior, the fact is that dogs are not motivated to acquire skills that will assist them in their chosen profession of detecting contraband. Rather, dogs are "conditioned," that is, they are induced to respond in particular ways to

particular [\*14] stimuli. For law enforcement purposes, the ideal conditioning would yield a dog who always responds to specified stimuli in a consistent and recognizable way, yet never responds in that manner absent the stimuli. But this does not happen. While dogs are not motivated in ways that humans are, neither can they be calibrated to achieve mechanically consistent results.

As our record demonstrates, conditioning and certification programs vary widely in their methods, elements, and tolerances of failure. Consider, for example, the United States Customs Service regime:

The Customs Service puts its dog and handler teams through a rigorous twelve-week training course, where only half of the canines complete the training. Customs Service dogs are trained to disregard potential distractions such as food, harmless drugs, and residual scents. Agents present distractions during training, and reward the dogs when those [\*\* 14] diversions are ignored. The teams must complete a certification exam in which the dog and handler must detect marijuana, hashish, heroin, and cocaine in a variety of environments. This exam and the following annual recertifications must be completed perfectly, with no false alerts and no missed drugs. If a dog and handler team erroneously alerts, the team must undergo remedial training. If

the team fails again, the team is disbanded, and the dog is permanently relieved from duty.

Bird, 85 Ky. L.J. at 410-11. In contrast, the testimony below disclosed that Razor and his handler had undergone just one initial thirty-day training course and one week-long annual recertification course. In neither course was Razor conditioned to refrain from alerting to residual odors. Whereas the Customs Service will certify only dogs who achieve and maintain a perfect record, Razor's certification program accepted a seventy percent proficiency. These disparities demonstrate that simply characterizing a dog as "trained" and "certified" imparts scant information about what the dog has been conditioned to do or not to do, or how successfully.

Finally, dogs themselves vary in their abilities [\*\*15] to accept, retain, or abide by their conditioning in widely varying environments and circumstances. "Each dog's performance is affected differently by working conditions and its respective attention span. There is also the possibility that the handler may unintentionally or otherwise prompt his dog to alert." Hansen, 13 San Diego L. Rev. at 416. The Customs Service monitors its dogs' performance in the field. Recognizing that a dog's ability can change over time, it maintains records for only thirty to sixty days, then discards them because older records are not probative of the dog's skills. Bird, 85 Ky. L.J. at 415. The Hillsborough County Sheriff's Office maintained no records of Razor's performance, and his handler had not kept track.



For these reasons, we conclude that the fact that a dog has been trained and certified, standing alone, is insufficient to give officers probable cause to search based on the dog's alert. One Florida case has recited additional factors that must be known in order to conclude that an alert by a narcotics detection dog is sufficiently "reliable" to furnish probable cause to search. In *State v. Foster*, 390 So. 2d 469 (Fla. 3d DCA 1980), [\*16] the Third District identified these factors as

the exact training the detector dog has received; the standards or criteria employed in selecting dogs for marijuana detection training; the standards the dog was required to meet to successfully complete his training program; the "track record" of the dog up until the search (emphasis must be placed on the amount of false alerts or mistakes the dog has furnished).

[\*15] *Foster*, 390 So. 2d at 470 (quoting Hansen, 13 San Diego L. Rev. at 417). We agree with this list of factors, and we especially join in the *Foster* court's emphasis on the dog's performance history. A dog's alert can give an officer probable cause to search only if the officer reasonably believes that the dog would not exhibit the alert behavior unless contraband was present. Given the "language barrier" between humans and canines-thus, for example, preventing the officer from questioning the dog further for corroborative details, as he might a human informant-

the most telling indicator of what the dog's behavior means is the dog's past performance in the field. Here, the State did not present any evidence of Razor's track record. Accordingly, [\*\*17] we conclude that the State did not meet its burden to establish that the deputies had probable cause to search Matheson's car.

We note that, even if we were to accept the State's position that it made a prima facie showing of probable cause founded solely on the fact that Razor was trained and certified, that showing was rebutted as a matter of law. The deputies' own undisputed testimony at the suppression hearing established that they knew that Razor's reliability for detecting the presence of contraband in the field was ungauged and that it could not be predicted based on his particular conditioning. In light of these facts, Razor's alert could not have given the deputies probable cause to search under any test.

We reverse the denial of Matheson's motion to suppress and remand with directions to discharge him.

FULMER and STRINGER, JJ., Concur.



IN THE CIRCUIT COURT OF THE  
SECOND JUDICIAL CIRCUIT, IN AND  
FOR LIBERTY COUNTY, FLORIDA

CASE NO.: 2006-42CFMA

STATE OF FLORIDA

vs.

CLAYTON HARRIS

Defendant,

\_\_\_\_\_ /

PROCEEDINGS: MOTION HEARING

BEFORE: THE HONORABLE  
RALPH SMITH, JR.

DATE: October 12, 2006

LOCATION: Liberty County Courthouse  
Bristol, Florida

REPORTED BY: LINDA CUNNINGHAM  
Notary Public in and for the  
State of Florida at Large

LINDA CUNNINGHAM  
Official Court Reporter  
Leon County Courthouse, Room 341  
Tallahassee, FL 32301

## APPEARANCES

### REPRESENTING THE STATE:

RICHARD COMBS, ASSISTANT STATE  
ATTORNEY  
OFFICE OF THE STATE ATTORNEY  
1A EAST JEFFERSON  
QUINCY, FLORIDA 32351

### REPRESENTING THE DEFENDANT:

JUDY HALL, ASSISTANT PUBLIC  
DEFENDER  
OFFICE OF THE PUBLIC DEFENDER  
LEON COUNTY COURTHOUSE ANNEX  
QUINCY, FLORIDA 32351

## INDEX

| WITNESSES:                      | PAGE: |
|---------------------------------|-------|
| BRIAN BATEMAN                   |       |
| Direct Examination By Ms. Hall  | 4     |
| WILLIAM WHEETLEY                |       |
| Direct Examination By Mr. Combs | 11    |
| Cross Examination By Ms. Hall   | 27    |
| CLAYTON HARRIS                  |       |
| Direct Examination By Ms. Hall  | 37    |
| Cross Examination By Mr. Combs  | 38    |

STATE'S:

|                         |    |
|-------------------------|----|
| 1                       | 26 |
| Certificate of Reporter | 56 |

## PROCEEDINGS

MS. HALL: We have one more thing, right --

MR. COMBS: Right.

MS. HALL: -- this morning. And that is a hearing for this afternoon that's set at one o'clock on Clayton Harris. And we have one witness who can't be here at one o'clock and he is here now and we would like to take his testimony.

THE COURT: Now, where is he on the docket?

MR. COMBS: He is -- Clayton Harris is a motion to suppress set for --

MS. HALL: Number 45.

Your Honor, at this time, we would call Brian Bateman to the stand. And we would invoke the rule and request that the other witnesses leave the courtroom.

THE COURT: All right. Identify your witnesses, bring them up here and I will instruct them on the rule.

MS. HALL: We just have the one who is going to testify now, Mr -- Deputy Bateman.

THE COURT: How many witnesses do you intend to call?

MS. HALL: Two

THE COURT: All right. Where is the other one?

MR. COMBS: Deputy Wheetley.

THE COURT: All right. We have got two witnesses. Let me go ahead and swear them and instruct them on the rule and we will have them step out.

Raise your right hand.

(The witnesses were first duly sworn.)

THE COURT: Okay. A rule of procedure has been invoked, which you all are familiar with. You will have to leave the courtroom at this time. Until the hearing is over with you all can't discuss the case with each other or with anyone other than the lawyers. And we will have one of you in at a time.

THE WITNESS: Yes, sir.

MS. HALL: And, Judge, just so we are clear, there is going to be a lunchtime recess here and this rule would continue.

THE COURT: Until this hearing is over with.

MS. HALL: Okay. Thank you.

Your Honor, I would call Deputy Bateman to

the stand.

Whereupon,

BRIAN BATEMAN

was recalled as a witness, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. HALL:

Q We are present in court in the case of Clayton Harris, 06-42CFA.

Deputy Bateman, do you know Clayton Harris?

A Yes, ma'am, I do.

Q And do you see him in the courtroom?

A Yes, ma'am.

Q And is this him sitting next to me at the table?

A Yes, ma'am.

Q And were you a witness to a stop and search of Mr. Clayton Harris?

A Yes, ma'am.

Q And when did that occur?

A I don't recall the date.

Q Approximately how long ago was that?

A I would say four to six weeks ago.

Q And how did Mr. Harris come to your attention?

A He was sitting in a vehicle. When I approached Deputy Wheetley had him pulled over prior to my arrival.

Q Okay. So, Deputy Wheetley had pulled him over and then you arrived on the scene?

A Yes, ma'am.

Q And he was still in his vehicle?

A Yes, ma'am.

Q And what did you observe happen?

A When I pulled up, I approached the vehicle on the back side by the guardrail and just stood there and observed Deputy Wheetley during the stop.

Q And what was Deputy Wheetley doing when you arrived on the scene?



A He was at the window interviewing Mr. Harris.

Q And what happened next?

A Deputy Wheatley pulled -- brought the dog out and went around the vehicle.

Q And this is out of his -- the dog he uses here in Liberty County?

A Yes, ma'am.

Q And what happened when he took Aldo around the vehicle?

A He, according to Deputy Wheatley, had made a positive odor detection on the driver's side door. I was on the back side of the vehicle.

Q On the driver's side door?

A Yes, ma'am.

Q And what happened at that time, after the positive alert?

A He put the dog back in his car and I stood with Mr. Harris at the back corner of the vehicle while Deputy Wheatley searched the vehicle.

Q And did he find anything?

A No. Only an open container of alcohol.

Q But no contraband of any kind?

A No, ma'am.

Q And do you have any knowledge of whether this was before or after the arrest of Clayton Harris that took place on June 24th, 2006? Was it since that time?

A It was since June 24th, but I have no knowledge of his arrest at that time.

Q And --

THE COURT: Let me stop you just a minute now. The incident this witness just testified about was an incident that occurred within the last four to six weeks, he is not sure when. But your question was, was it on June 24th and he said it was not.

MS. HALL: Correct.

THE COURT: Okay. So this testimony is not whether or not the evidence seized on June 24th should be suppressed or not?

MS. HALL: Well, it is, Your Honor, in that Deputy Wheetley -- I'm arguing that the dog made a false alert on Mr. Harris.

THE COURT: But that's on some day other than the date of the commission of the crime that's being prosecuted.

MS. HALL: Yes, sir. The issue before the Court is the reliability of the dog.

THE COURT: Oh, okay. Well you didn't bring that to my attention.

MS. HALL: I'm sorry. That's what we are talking about.

THE COURT: Okay.

MR. COMBS: That's where the issue that the defense is claiming to be an issue. We will have some testimony about that. I submit most of this is irrelevant, but she is allowed to present what she wants.

THE COURT: All right. Go ahead.

BY MS. HALL:

Q What type of vehicle was Mr. Harris driving on that occasion?

A It was a pick-up truck.

Q Do you recall a color?

A No, ma'am, I don't.

Q Did it have a toolbox in the back? You don't remember?

A I don't recall.

Q      Okay

THE COURT: Well, let me be sure I have got his testimony right, because I was trying to relate it back to the offense that's being prosecuted. Mr. Wheatley was there, observed -- I mean, this witness was there at the scene, observed Mr. Wheatley talking to the defendant. He then observed Mr. Wheatley taking his dog Aldo around the vehicle. And you didn't see the dog alert at all?

THE WITNESS: No, sir.

THE COURT: Okay. And then later on Mr. Wheatley told that you he alerted to the driver's side door?

THE WITNESS: Just from Mr. Wheatley's actions he -- I was aware that it was a positive ID, but the dog was actually behind the vehicle. I was on the other side. I didn't see it.

THE COURT: But you didn't see it?

THE WITNESS: Right.

THE COURT: But that's what Wheatley told you?

THE WITNESS: Right.

THE COURT: He then made a search of the driver's side door and didn't find anything. Is that what --

THE WITNESS: Right. He made a search of the vehicle, yes, sir.

THE COURT: And all he found was an open container of beer or something?

THE WITNESS: Yes, sir. It was an open container of alcohol.

THE COURT: Is that all you need to get out of this witness?

MS. HALL: Yes, sir, I'm finished.

THE COURT: All right. Mr. Combs, do you have --

MR. COMBS: I don't have any questions, sir.

THE COURT: All right. Thank you very much. Call your next witness.

MS. HALL: Your Honor, I think we are going -- you want to wait until one.

MR. COMBS: Yeah. The rest of the hearing is set at one.

MS. HALL: The rest of the hearing is set at one o'clock.

MR. COMBS: -- because he was not available at one o'clock.

THE COURT: Well, you only one got other witness; right?

MS. HALL: Well, I have got two more witnesses.

THE COURT: You have got two more?

MS. HALL: Yes, sir

THE COURT: If they are not going to be any longer than he is, why don't we --

MR. COMBS: I think I need to--

MS. HALL: I think we need to --

MR. COMBS: Yeah, if we could just do it at one o'clock, Judge, I'm not --

MS. HALL: There's legal issues that I think Mr. Combs --

THE COURT: Okay.

MS. HALL: -- needs an opportunity to look at.

THE COURT: You want to take a lunch break now and be back at one o'clock.

(Lunch break taken.)

(Other proceedings were held and the Court recalled the case of the State of Florida versus

Clayton Harris as follows:)

MR. COMBS: Judge, Clayton Harris. And the State would call Deputy Wheatley.

THE COURT: I believe you were already sworn, weren't you?

THE WITNESS: Oh, that's right, sir. It's been a long time.

Whereupon,

WILLIAM WHEETLEY

was recalled as a witness, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COMBS:

Q Sir, can you state your name and occupation?

A Yes. William Wheatley, canine officer, Liberty County Sheriff's Office.

Q Okay. How long have you been in law enforcement, sir?

A Three years.

Q And you identified yourself as a canine



officer. Can you give the court a description of your training and your background that led up to your position as a canine officer?

A Yes, sir. I went through a 160 hour course with the Dothan Police Department back in '04, which was a basic handling course with my dog before, 160 hours. I had that dog until July of '04, and then -- I'm sorry, of '05, and that's when I got canine -- the canine I have now, though. I've had -- I went through another 40 hour course with Dothan P.D. We also do four hours a week training, which is continual training.

Q Let me slow you down here. So you went through the 150 hour course. Is that your basic preliminary course for being certified to handle a dog?

A Yes, sir. Basic narcotics dog.

Q And, at that time, you had a -- one dog, and then in July of '05 you got Aldo?

A Yes, sir.

Q Okay. And what was Aldo's training and everything at the time that you partnered up with him?

A At that time, I worked for Marianna Police Department. When we got him, we got him from Seminole county, Florida. At that time, he had some training that he successfully completed a narcotics detection course with the Apopka Police

Department and also had 120 hour course with the -- with the -- I'm sorry, with the Apopka, yeah, 120 hour course. And he also had a drug certification through Drug Beat, an actual canine certification.

Q Okay. So he had been through a certification program back in, when was this, '04?

A Yes, sir, '04.

Q Okay. And when you then partnered up with him in '05, he had already been through the training. Did you have to go through some training with him at that time?

A No, sir. But we do continual training every week.

Q You said something about you went to another 40 hour course?

A Yes, sir. Yes, sir.

Q What was that?

A January of '06, I went through a 40 hour course with Dothan P.D. That's who I do the majority of my training with and that's a 40 hour course in narcotics detection, 12 hour days.

Q Is that a -- like a refresher course that's required periodically at some point in time?

A It's not required, but it's recommended.

We do it every year.

Q Okay. Now, when -- your canine, Aldo, how long have you had him?

A Since July of '05.

Q Okay. And during that -- do you have with you some copies of his certificates of training and his certification through the canine certifications?

A Yes, sir, I do.

Q And what -- on his certification, what was he trained for in the way of drug detection designation?

A Marijuana, methamphetamine, cocaine, heroin. Also, did some crack cocaine and some ecstasy.

Q Okay. Do you have, then, on the certification, does it list what substances that a particular dog is certified to look for?

A Yes, sir. On this one, it is listed on there.

Q Are there some things that he was not trained for, some substances he wasn't trained for?

A Yes, sir. As I listed here, he is not a bomb detection dog. He does not detect the odor of alcohol, so on and so forth.

Q And did you also then -- did he receive then, after he had this initial certification, though, did he receive some more training in -- through the Dothan Police Department?

A Yes, sir. Yes, sir. That was the seminar we do every year. Yes, sir.

Q And now is that done with Aldo?

A Yes, sir. That was done with Aldo, yes, sir.

Q Okay. After you partnered up with Aldo, did you start then doing some type of in house training and exercise with Aldo on a regular basis?

A Yes, sir. Due to my schedule, it would usually fall on either a Tuesday or a Thursday and I would do four hours, which is required by the State, and it would either be with the Dothan Police Department, a surrounding agency, or the other cocaine officer that I was employed with at the Marianna Police Department.

Q What type of training would you do on this --

A Usually vehicles or buildings or warehouses, depending on the situation at the time.

Q Could you describe what -- when you say a vehicle, what were you doing?

A Well, we would go to the wrecker yard. We would pick may be eight to ten vehicles. We would make about six to eight of them hot, then we would have some blanks.

Q Okay. Blank meaning what?

A There would be no dope in the vehicle.

Q Okay. So there would be multiple vehicles, some without dope, some with dope?

A Yes, sir.

Q Okay. And then what would you do?

A We would take the dogs through there just to ensure that the dog was not alerting or showing an odor response to a vehicle that did not have narcotics.

Q Okay. For Canine Aldo could you describe what the process is with him in conducting a search for drugs and what constitutes an alert with -- on his part?

A Yes, sir. Take the dog and we do a W pattern, up, down, up, down. When Aldo gets in the scent cone of the odor of narcotics, he will -- there is a couple of different responses the dog will have. He will get excited. He will take a long sniff. His heart rate will accelerate. His feet will start pattering. He will -- also, the main thing is sit.

MS. HALL: He will also what? I'm sorry?

MR. COMBS: Sit.

BY MR. COMBS:

Q Some dogs are trained to scratch and things of this nature?

A Yes, sir. That's called an aggressive response. My dog is passive.

Q Okay. So he sits, but he also indicates other activities of being excited?

A Yes, sir. He would be excited.

Q So it's kind of an excitement and a passive thing. And the sitting is kind of the two things at once, then?

A Yes, sir. Yes, sir.

Q And that's an indication that he has, in fact, detected one of those odors he is trained to detect?

A Yes, sir, that's correct

Q When you're doing your training with him when he does detect an odor, what happens at that point?

A At the point, he gets a reward. Is that

what you're speak of?

Q Yes, sir.

A Yes. The dog is trained with the reward. And that's why a lot of times the dog will get excited when he finds the odor, because once he indicates on the odor he knows that his reward is coming next.

Q When you -- after you started -- finished your training with Aldo, did you start keeping a log of these exercises that you went through with him?

A Yes, sir. I keep a training record of -- they started it back in -- I moved from Marianna, but I got it started from November of '05 up until now. My training records changed, I believe, in January, so when we really got detailed into houses and vehicles, open areas and so forth.

Q Okay. So, in January you changed the form?

A Yes, sir. I -- yes, sir. This is something new to me. We are continuing to progress.

Q Okay. But you still, with every week, have him do certain searches and see what -- if he would respond correctly?

A Yes.

Q Okay. And when he would -- how was his performance when you trained with him?



A His performance was good. It was really good.

Q He would alert on the -- if you had eight vehicles with drugs on them, did he -- would he alert on those eight vehicles?

A Yes, sir.

Q And did you have occasions to also use him out in the field?

A Yes, sir. You talking about on the road?

Q On the road.

A Yes, sir. Yes, sir.

Q And how often would you have actual occasions on an average month that he would be utilized in a real situation as opposed to a training situation?

A I would say in a month probably ballpark five times.

Q So he actually then would have more training time than he would actually have field time --

A Yes, sir.

Q -- for this? You have with you the training records?

A No, sir. I don't have the training records.  
I -- no, sir, not on me.

Q Okay. Let me show you these. Is this  
what you provided to me?

A Yes, sir.

Q Okay. Are these copies of the training  
records?

A Yes, sir, they are.

Q And is that, then, a log of the dates and  
the situations in which you went through with  
training with the Canine Aldo?

A Yes, sir, that is correct.

Q Now, drawing your attention then,  
specifically to June the 24th of 2006, did you have  
occasion to be involved with Canine Aldo in a street  
situation in which he was utilized as a drug dog?

A Yes, sir.

Q What led up to that?

A Well, I was patrolling east of Bristol on  
State Road 20 and I was coming back westbound and  
was behind a vehicle when I noticed that the tag was  
expired. I then ran the information to confirm the  
fact that it was expired. Once that was confirmed, I  
did go ahead and stop the vehicle.

Q Okay. So you did a vehicular stop of the vehicle?

A Yes, sir.

Q And the individual that was the driver of that vehicle, is that the defendant in this case, Clayton Harris?

A Yes, sir.

Q Okay. What happened after you made the vehicle stop?

A Once I stopped the vehicle, I approached and advised him for the reason of the stop. He stated that -- he stated that he knew that his tag was expired. And, also, while -- at the time, I noticed that Harris was visibly nervous due to the fact that he is shaking and the rapid rise and fall of the chest.

Q And he seemed to be nervous at this time?

A Yes, sir.

Q Did you notice anything in the vehicle that caught your attention at that point?

A Yes, sir. There was an open container of Bud Light, a can, sitting in the cup holder.

Q Did you have your Canine Aldo? Was he with you at this point?

A Yes, sir. He was in the vehicle, in my patrol vehicle.

Q When you're normally on patrol is he often with you, then?

A Yes, sir, every time.

Q Did you utilize Canine Aldo on this particular traffic stop?

A Yes, sir, I did.

Q Tell us about that?

A Okay. When I talked to Mr. Harris, I asked for consent to search. At that time he denied the consent. I went -- returned to my vehicle to get Canine Aldo. When I was deploying my canine, I noticed that Mr. Harris was moving around the cab of his vehicle, he was on his cell phone. I then took Aldo, we did a free air sniff of the exterior of the vehicle. Canine Aldo showed a positive odor response to the door handle on the driver's side.

Q Okay. And when you say "a positive response", can you explain what that --

A Yes, sir. He got excited and he sat.

Q Okay. And this was on the door handle?

A Yes, sir, on the door handle.

Q Okay. And what happened after you got a positive response from him?

A At that point, I went ahead and placed him back in the vehicle. I went up and told Mr. Harris exactly what I had. I told him that I would be conducting a search due to the fact under the constitution I have the right. I then removed Mr. Harris, patted him down, and then conducted my search of the vehicle.

Q The reaction that Canine Aldo exhibited on July the 24th of 2006, was that the consistent reaction that he showed in your test situations with him on drug sniffs?

A Yes, sir. On my training and on the road that is consistent with what he does, yes, sir.

Q From the reaction that he gave then, that lead you to believe there might be some narcotics in this vehicle?

A The odor of narcotics, yes, sir.

Q And then you also observed the fact that this individual, the driver of the vehicle, was nervous?

A Yes, sir. He couldn't sit still.

Q And there was an open container of alcohol in the vehicle at the time?

A Yes, sir.

Q And he was driving with an expired tag?

A Yes, sir.

Q So based upon this, then, did you do a search of the vehicle?

A Yes, sir. At that point, I did conduct a search of the vehicle.

Q And what did you find?

A I started on the driver's side of the vehicle. I discovered a white plastic Walgreens bag underneath the driver's seat. It was wrapped in a shirt. It contained well over 200 Pseudoephedrine pills. The pills were loose and there were pieces of the blister packs, the foil pieces in the bag, as well.

Q And what else did you find?

A Okay. I went on to search. I went to the passenger side, started a search on the passenger side and found a white plastic bag underneath some clothes that contained eight boxes of Publix brand matches. Each box contained a 1,000 matches, which counted to an 8,000 match count.

At that point, I went ahead and placed him under arrest for possession of listed chemicals. I went ahead and read him his Miranda rights. I went ahead, then, and searched the passenger side of the toolbox, at which time I discovered the muriatic acid. At that point, I called my lieutenant to come on scene.

Q Okay. These various chemicals, are they found in the substance methamphetamine?

A Yes, sir. Yes, sir. They are precursors.

Q What? They're call precursors?

A Yes, sir.

Q And --

MS. HALL: Your Honor, I would like to know, does this witness have any expertise in the manufacture of methamphetamine or does he have any basis for stating what -- of his own knowledge, what precursors are?

BY MR. COMBS:

Q Sir, have you had any training at all concerning methamphetamine?

A Yes, sir. I did attend an eight hour course with FDLE --

Q On methamphetamine?

A -- on methamphetamine

Q And did that course include the making of methamphetamine and the substances that are used to make methamphetamine?

A Yes, sir. How to cook it and the list of



chemicals.

MS. HALL: Was that prior to June 24th?

THE WITNESS: Yes, ma'am.

MS. HALL: Thank you.

BY MR. COMBS:

Q After you placed Mr Harris under arrest, did you have occasion, along with Lieutenant Shuler, to take a statement from Mr. Harris?

A Yes, sir, we did.

Q And what did Mr. Harris inform you concerning the substances you found in the vehicle?

A He went on -- he began to state that he drove to Tallahassee on this date where he purchased the two boxes of Pseudoephedrine pills from three different Walgreens stores. He stated he went to Albertson's to purchase two more boxes of the same pills and he stated while in Tallahassee he purchased eight boxes of matches from the Publix store. And then before leaving, he purchased two bottles of Heat Brand Antifreeze Water Remover from Advanced Auto Parts on Tennessee Street in Tallahassee. Then, he stated on 6/23 he stopped at a store located at the corner of county Road 267 and State Road 20 in Liberty County where he purchased two boxes of the Pseudoephedrine pills, also.

Q Did he indicate -- now, the pills you found were loose; is that correct?

A Yes, sir.

Q Did he indicate that he had removed all of those pills from the blister packs?

A Yes, sir. He stated that he had thrown them out the window on the way back.

Q Did he make any statements about his connection with cooking of the methamphetamine?

A Yes, sir. Yes, sir. He said that he has been cooking methamphetamine for about a year. He was then asked the last time he cooked methamphetamine and Harris stated, Two weeks ago at my house in Blountstown. Harris went on to state that he can't go more than a few days without using meth. That's a big problem with his addiction.

MR. COMBS: At this time, I would like to offer into evidence --

BY MR. COMBS:

Q Do you have copies of the certification for the dog or should I --

MR. COMBS: I mean, I have got copies, Judge.

MS. HALL: Well, I would object in that these are copies and are not admissible into evidence since

they are just copies and they are not originals.

MR. COMBS: Well, the originals -- here are the originals and I have got copies of the originals to offer to the Court for record purposes.

MS. HALL: These are not originals. These are the --

MR. COMBS: Those are the copies. This is the original.

MS. HALL: Okay. All right. I have no objection.

THE COURT: Without objection.

MR. COMBS: I would offer the copies, Judge, so we don't have to constantly take them in and out of evidence.

MS. HALL: No problem.

MR. COMBS: I would offer that as a composite/exhibit of the certificates of the training and -- of the dog's certification and then the training records conducted by Deputy Wheatley from November of '05 until July of '05, I believe are the records we have.

THE COURT: It would be received as State's Composite/Exhibit 1.

(State's Composite/Exhibit No. 1 received in

evidence.)

MR. COMBS: I don't have any further questions, Judge.

THE COURT: Cross?

MS. HALL: Yes, sir.

### CROSS EXAMINATION

BY MS. HALL:

Q In regards to the certification, Deputy Wheatley, how often does a drug dog have to be recertified?

A In the State of Florida the dog is not required, a single purpose drug canine is not required to carry a certification.

Q So --

A It's only dual purpose.

Q So this dog is not certified?

A It's only single purpose. He had a certification from Apopka -- from Drug Beat, I mean.

Q Now, as far as a drug dog, how often does he have to be recertified?

A He has got a certification coming up next

week. There is -- case law states he does not have to carry an actual certification. There is no standard in the State of Florida as a certification for the State. It's a dual purpose canine, for apprehension and drug detection, that is required to carry a certification, FDLE.

Q So, drug dogs aren't required to be certified?

A They are required to show proficiency in locating narcotics.

Q So is Aldo certified in drugs?

A He has that certification that you have also. You have a copy of that.

Q Right. But what I'm asking you is, you can't certify a dog once and then for the rest of his life he is certified, right?

A As long as he shows proficiency in locating narcotics. As I stated before, there is no set standard in the State of Florida. There is no FDLE certification for a single purpose canine for narcotics.

Q And in this case, do you keep records in the field of his successes and failures in the field?

A What do you mean by failures?

Q I mean, when -- every time you use him in the field, which you say is four or five times a

month --

A Yes, ma'am.

Q -- do you keep a record of any records that show what date that was and what the result was?

A Keep a records of the ones where I actually make arrests in the cases of positive responses with -- to the odor and then also finding narcotics in the vehicle? Yes, ma'am, I keep records of the arrest, yes, ma'am, of the cases.

Q And I believe I requested those records and I did not receive them.

A I did not receive any subpoena for those records.

Q It wasn't a subpoena. It was a request for discovery.

MR. COMBS: You have got those -- you could go down and get everything you want right downstairs. I don't have it. I gave you what I got.

MS. HALL: Your Honor, I did file a request for discovery. I asked for all records that they had concerning Aldo. I was provided today, this morning, with records of his training, but I was not provided with any records of his field results.

THE WITNESS: I can -- those are on the laptop. If you want them, I could print them out. Not

a problem.

MR. COMBS: Now, I provided her what I have, which is the only thing I'm required to do and received this request --

MS. HALL: Judge, I strongly object to that.

MR. COMBS: -- about three days ago. And I got what I had and I gave it to her this morning.

MS. HALL: He is required to produce everything that's within the -- and in my --

THE WITNESS: Ms. Hall, when you had me in deposition you said, discovery, you wanted the records and certifications. That's what I produced.

BY MS. HALL:

Q Records of his field results.

A You didn't clarify. You said you wanted his records, his training records and his certification --

Q But I did clarify in my discovery request to Mr. Combs.

MS. HALL: So, Your Honor, I would object that I was never provided with the field results.

THE COURT: Mr. Combs says that he provided you what he had within the three days that it was that you asked him for it.



MS. HALL: Well, Judge, he is required by law to provide me with everything in the possession of a state agent, which includes Deputy Wheetley.

THE COURT: I would think that's an overstatement of the discovery request. And, also, she overstating what she asked for. She asked for all records and certification, all conditioning and training records. And there is nothing in here that you want all records of all cases in which he was -- made an arrest on. That's not listed in your motion to compel. These are all records of his performance and that's what he got, the training records.

MS. HALL: No, of his performance. By performance, it's in the field.

THE WITNESS: That would bring in other cases with other names. It's not hard. I just didn't. You didn't clarify when we were in the deposition. If you would have clarified it, I would have definitely had those for you.

BY MS. HALL:

Q So you only keep records of where he -- where you actually make an arrest?

A Yes, ma'am.

Q So you would not have a record of your subsequent time that you stopped Clayton Harris and did another drug sniff test; is that correct?

A That's correct.

Q And when you stopped Mr. Harris on this subsequent occasion, was he driving the same vehicle?

A Yes, ma'am.

Q And did you -- why did you stop him?

A For passenger side brake light.

Q And when you -- did you use your dog?

A Yes, ma'am.

Q And did your dog alert?

A Yes, ma'am.

Q And how did your dog alert?

A The same way in which he alerted the previous time that I stopped Mr. Harris, and also alerted on the same area of the vehicle showing an odor response.

Q And what area of the vehicle was that?

A That was the driver's door area.

Q And where on the driver's door?

A It was the driver's door handle.

Q And at that time, did you conduct a search of that vehicle?

A Yes, ma'am.

Q And do you recall giving a deposition on October 6th, which would have been last week?

A Yes, ma'am. But it -- it came back to me after we had spoken that day. Yes, I remember what I stated in deposition and I did not recall what had happened. But, yes, ma'am, I do remember walking the dog around and the dog alerting.

Q Well, I believe your statement was that-- that you did not, in fact, search the car on the second stop of the vehicle; is that correct?

A That's what I stated that day, yes, ma'am. I made a lot of stops and I do a lot of work with the dog and a lot of narcotics work. So, yes, it's not very clear at that point in time, but it did come back to me that, yes, I did use the dog and the dog did alert to the vehicle.

Q And it has now come back to you that you also searched the vehicle?

A Yes, ma'am.

Q And did you find anything?

A Just an open bottle of liquor.

Q And do you recall approximately how long after this stop that we're talking about on June 24th that you conducted the second stop?

A No, ma'am.

Q Is this dog trained to alert to Pseudoephedrine?

A He is trained to show an odor response to methamphetamine. Pseudoephedrine is a chemical, an ingredient, in the methamphetamine.

Q But are you an expert to know whether there would be an -- that what the dog has been trained to alert to in methamphetamine it would, in fact, exist in a Pseudoephedrine pill?

A That would be a question for a chemist, I guess.

Q Was your dog ever trained to alert to Pseudoephedrine?

A Ma'am, my dog was trained to alert to the odor of methamphetamine.

Q But not Pseudoephedrine?

A Pseudoephedrine is a listed chemical as an ingredient in methamphetamine.

Q Was your dog ever trained to alert to Pseudoephedrine?

MR. COMBS: Objection --

THE WITNESS: No, ma'am.

MS. HALL: He hasn't answered it yet.

THE WITNESS: I said, no, ma'am.

BY MS. HALL:

Q Is the answer yes or no?

A No, ma'am.

Q Was he trained to alert to matches?

A No, ma'am.

Q Was he -- and that was the only objects you found in the cab of the truck for the drug that the dog alerted; correct?

A In the cab.

Q And the muriatic acid and the Heat were discovered in the toolbox --

A Toolbox.

Q -- in the back. And the iodine crystals were in the bed of the truck, which all of them could have been influenced by the air?

A Yes, ma'am.

Q So, basically, your dog, who you've entered records, he is certified to alert to marijuana, methamphetamine, cocaine, heroin, crack cocaine and ecstasy; is that correct?

A Let me look at the same paper you're looking at.

Yes, ma'am.

Q And none of those specific items were in this truck?

A May I explain my answer when I answer this next question?

Q No, sir. I just want you to know --

A I don't feel comfortable answering that without explaining.

Q Were any of those specific things found in this vehicle?

A No, ma'am, those specific things were not.

Q Okay. Now, when the dog alerted to the door handle, did that indicate to you he was alerting to anything inside the truck?

A May I explain my answer?

Q Well, I prefer a yes or no answer.

MR. COMBS: That was not a yes or no question. That asks for an explanation.

THE WITNESS: Okay. Well, the question you asked -- I will answer your question that you asked. What it tells me is when my dog alerts to a door handle, it usually means, in the cases which I have worked in the past, that somebody has either touched the narcotics or have smoked narcotics, the odor is on their hand when they touched the door handle is when the odor transfer occurs. And that's when my dog will pick up on the residual odor of the narcotics.

BY MS. HALL:

Q So you have no idea -- do you know how long ago somebody might have touched that vehicle?

A Ma'am, you're asking me a question for an expert. I don't feel comfortable answering that.

Q Do you know whether it could have been someone other than the person driving the vehicle?

A I can't answer that question, ma'am. He is the owner of the vehicle.

Q Is there -- are you familiar with something called a dead scent?

A No, ma'am. Can you explain?

Q What we're talking about is an odor that has been there for some time, but it's not a present or



current odor?

A Are you speaking of residual odor?

Q Yes, sir.

A Yes, I'm aware of residual odor.

Q And that's what we are referring to here is a residual odor, but we don't know how long a residual odor can remain there?

A The residual odor is there. That's what caused my dog to show the response. So if it's there, my dog responded to the odor, so which -- apparently, the odor was there.

Q But you have no way of establishing in this case that this is not just a false alert by your dog?

A Ma'am, we found the precursors to methamphetamine, all the listed chemicals were in the truck. He admitted to not being able to go more than two days without using. I think that pretty much places the odor on the door handle.

Q The dog, however, did not alert to any of the things he has been trained to alert to as far as your knowledge?

A Ma'am, he was trained to alert to the odor of narcotics, which he alerted to the odor of narcotics on the door handle.

MS. HALL: I have no further questions.

MR. COMBS: I have nothing further, Judge.

THE COURT: All right. You may step down.

THE WITNESS: Yes, sir.

MR. COMBS: I have nothing further to present.

MS. HALL: Judge, I would present Clayton Harris as a witness.

THE COURT: Mr. Harris, before you sit down, the clerk will place you under oath.

Whereupon,

### CLAYTON HARRIS

was called as a witness, having been first duly sworn, was examined and testified as follows:

### DIRECT EXAMINATION

BY MS. HALL:

Q Mr. Harris, I believe you heard Deputy Wheetley testify about pulling you over and his dog alerted to your truck?

A Yes, ma'am.

Q Did you -- after he stopped you, did you advise him you did not want him to search your vehicle?

A Yes, I did.

Q And while he performed the dog sniff where were you seated?

A On the driver's side of the truck.

Q And was your window opened or closed?

A It was open.

Q And when the dog went around your truck, what did you observe about his behavior?

A Nothing different than he went all the way around the truck. He did not sound or make any kind of response.

Q Did he sit?

A No, ma'am.

Q Did he act excited?

A No.

Q Did he stop --

A No.

Q -- at your door handle?

A No.

Q So, the dog made no response?

A No response.

MS. HALL: I have no further questions.

THE COURT: Cross?

### CROSS EXAMINATION

BY MR. COMBS:

Q This dog made no response, then you were arrested; is that correct?

A Yes, sir.

Q And isn't it correct that you admitted to the law enforcement officers that you, in fact --

MS. HALL: Your Honor, I object. This is going way beyond the scope of direct, which was only the behavior of the dog.

MR. COMBS: It goes to the credibility of this testimony as to his claim of the behavior of the dog.

THE COURT: The objection is overruled.

MS. HALL: Your Honor, then, I would ask him

to take the Fifth Amendment as to that question.

MR. COMBS: If he takes the Fifth Amendment, then I ask that all of his testimony be stricken as being incredible. If he is not going to answer the questions that puts his credibility at issue, then --

THE COURT: That's the truth, the whole truth and nothing but the truth.

MR. COMBS: If he is going to take the Fifth Amendment, I ask that all of his testimony be stricken from the record.

THE COURT: Okay. We want him to invoke the Fifth Amendment?

MS. HALL: Yes, sir, we will.

THE COURT: The motion is granted. The testimony is stricken.

MS. HALL: It's my understanding that the State could not go beyond the scope. If they are permitted to do that, we would take the Fifth and that would conclude his testimony.

THE COURT: You may step down.

Do you have any other evidence?

MS. HALL: No. No, your Honor.

MR. COMBS: Nothing further, Judge. The State would submit that the motion should be denied. That based upon the testimony presented, there is sufficient testimony in evidence of a probable cause. There was a justifiable stop due to an expired tag. There was also an open container in the vehicle, so there was two law violations that were being conducted.

Then, we have the additional aspect of the -- the search probably could be justified simply as incident to arrest for an expired tag and an open container. And then we have the additional evidence of a trained and certified canine dog that we have also shown, not only that, but that he has a track history of successful training as contained in the logs, which was provided to the Court for months after months worth of successful training in various situations.

And I would submit that the officer, then, based upon the dog's reaction, had probable cause. And when you couple it along with the defendant's nervousness and his other violations, he had probable cause to conduct a search of the vehicle and the motion should be denied.

MS. HALL: Your Honor, in regard to the expired tag and the open container, the officer had a right to write a citation and go on his way. And instead, he says that due to nervousness he wanted to search the car. Well, nervousness does not -- is not probable cause and there is quite a bit of case law on that.

So, we come down to this dog. And, apparently, the officer didn't think he had probable cause to search, because he went and got his dog. The dog alerted to the door handle. It did not alert to anything in that vehicle, because there is nothing in that vehicle that that dog was trained to alert to. Nothing. No cocaine. No marijuana. No methamphetamine. Nothing that the State can show that this dog was trained to alert to was in that vehicle.

THE COURT: Well, your theory is that if he were a convicted felon and he thought his dog had alerted to dope and he made a search incident to the probable cause, as he had searched for dope and he found a gun, the gun should be suppressed and could not be used in any evidence against him?

MS. HALL: That's correct, because the only reason a dog sniff -- Judge, the only reason the dog sniff alert provides probable cause is that the dog smells something in the truck.

THE COURT: Then, if you make the search, which is a lawful search, and found something other than dope, that can't be used.

MS. HALL: No, sir, that's a suppression.

THE COURT: Pardon?

MS. HALL: That has to be suppressed, because there was nothing the dog -- I mean, the dog -- it's a false alert.



THE COURT: Okay.

MS. HALL: There is nothing there the dog could have alerted to.

THE COURT: Anything that's in open view and they find when you are doing a drug search or -- he has got a free ticket on him?

MS. HALL: Judge, it's whether there was probable cause for him to search that vehicle, and there wasn't, because there was-- just the smell, an old smell on a handle that could have been there for --

THE COURT: -- old smell is, the dog alerted and that gives an officer probable cause.

MS. HALL: But that could have been on there -- the case law, and the case that I cited, which is Matheson v. State, 870 So. 2d 8, Second District Court of Appeal. That case says if it's a false alert or an old alert, one or the other, that is not probable cause. And this is a false alert.

THE COURT: How is that officer to know that it's an old odor and not a new odor?

MS. HALL: Precisely. And we know in this case. And there is not a single case that Mr. Combs can cite to where it has ever been a -- presented to an Appellate court a challenge to a drug sniff case where there was absolutely nothing in the vehicle that the drug -- the dog was trained to alert to. There is not a single case that would justify that.

THE COURT: Mr. Combs, did you agree with her?

MR. COMBS: No, sir, not at all.

MS. HALL: Which case can you cite?

MR. COMBS: The defense cites -- the case they cite, unfortunately, they have to read it. And the only reason the case, in the particular case, held -- said that here at the hearing the State did not present any evidence concerning the dog's track history. We did in this hearing.

The case does not at all address the fact that the U.S. Supreme Court in, U.S. versus Place, at 462 U.S. 696, held specifically that a trained dog, drug dog's alert, is, in fact, probable cause and there is no other requirement. And under the State -- in the State of Florida by our Constitution, the Courts are required to follow the U.S. Supreme Court in these matters. And they did, in fact, do so in Caldwell versus State, the First District Court of Appeal, in 482 So. 2d 518 (sic), held that a drug dog's alert is, in fact, probable cause in and of itself.

This, in fact, came up, if you could -- there is another case that's kind of -- the reason I know this is because I started it. There was a Berry versus State, which is at 316 So. 2d 72, in which they've held that an officer's sense of smell of marijuana is sufficient for probable cause. It doesn't mean whether or not the marijuana was still in the vehicle or what he smelled was the smoke or that the participants had been

smoking it and it was all gone and all he smells is what's left. They've held an officer smell is sufficient probable cause. I raised that as my basis, which in the Bowing (phonetic) case out in the Fifth DCA, which was then ruled that that is, in fact, sufficient for a dog. Once again, also held in U.S. versus Solis, 536 F.2d 880.

When we are talking about probable cause, we are talking about the totality of the circumstances viewed in the light of the officer's knowledge, training, and experience. And the failure of the defense's argument in this is like when we try to bootstrap a search warrant, if we have an search warrant and argue that this -- we have proof that there was sufficient probable cause in this search warrant, because when we went to serve the search warrant we found what we are looking for. And they specifically held that the results of the search cannot be utilized and bootstrapped to probable cause. The probable cause is based upon what you have at that point in time.

And the evidence in this case is clear that the dog had sufficient training, and then had a track history of assisted training, that led to an alert that gave the officer, based upon the totality of the circumstances, an individual driving with an expired tag, open container, appeared to be nervous, dog alters, that there is probable cause. It -- this is not the standard that the defense wants to establish that this is the proof of the case beyond a reasonable doubt that there is drugs in the car. No, this is simply that the officer had a reasonable basis to conduct a search

of a vehicle.

It would be the same thing as if we did the drug searches in this -- and this is where I knew about them when they first came up out at the airport, where they alert on the luggage. There we could not search right away, had to go get a search warrant based upon that, and it was held to be sufficient.

As to the defense challenge as to there is no case having to do with probable cause based simply on scent, I would cite to Lobo, a case found at 505 So. 2d 621, in which they upheld that it was probable cause, and they used that term, probable cause, to forfeit monies in which the drug dog alerted on. Drug dog is alerting only on the scent of what was on the money. There is no drugs being forfeited here. It is the money at which the drug dog alerts to and they held that that is probable cause that -- in and of itself to do that forfeiture of that monies. And so I submit that the motion in this case should be denied.

MS. HALL: Judge, I would again respond, every single one of those cases, drugs were found. So they knew there was something there the dog could have smelled. In our case, there is nothing there that the dog could have smelled, because he is not trained in any of those things.

Now, Mr. Combs points out that in the other case that there was no track history. Here, there is -- no track history was presented, no field, no evidence of his success in the field. And any dog can be put through certification and training, but it's whether he

can obtain positive results in the field that counts.

Now, in this case, not only do we know he made a false alert here, but we know he made a false alert on another instance on this same vehicle, at the same way, and both times there was nothing in that vehicle. Now, the first time they can say, Well, maybe there was something else he could have smelled, but the second time there was absolutely nothing. We know in this case, the facts establish, it's a false alert.

MR. COMBS: Just for the record, Judge, a false alert would show up in his training history when you have a vehicle or a place in which we know there are no drugs or drugs have not been found and the dog falsely alerts. That's not shown in any of those records. There is no false alert. This is an alert on the residual chemicals of an individual that used methamphetamine by his own admission on a regular basis. And so there is -- the idea of using the term "false alert" is incorrect. And --

THE COURT: The Court is going to deny the motion to suppress and find there is probable cause to support the search of the vehicle in question and the evidence seized is admissible and the evidence against the defendant. So, the motion to suppress is denied.

MR. COMBS: Judge, we are set for trial on this case on Monday. This is also our pretrial. And we need to know whether we are going to trial. We have got-- this would be our one trial for Monday.

THE COURT: Okay.

MS. HALL: Judge, at this time, if Mr. Combs is agreeable, we would enter a plea of no contest with reserving the right to appeal this denial of the motion to suppress.

MR. COMBS: We are talking about pleading straight up?

THE COURT: What was the plea offer?

MS. HALL: As long as you will agree --

MR. COMBS: It's dispositive. For purposes of an appeal, yes, I would agree on that.

MS. HALL: Okay.

MR. COMBS: But I will not agree to anything else.

THE COURT: All right. What you want to do is enter a plea?

MR. COMBS: Yes, sir. I assume it's straight up?

MS. HALL: Yes.

MR. COMBS: Okay.

THE COURT: Reserving the right to appeal this Court's denial of your motion to suppress.



MS. HALL: Correct. And that has to be approved by the State. And the State does approve it in this --

THE COURT: So, it's not a negotiated plea? It's a plea --

MR. COMBS: That's correct, Judge. I made a plea offer that involved DOC, which apparently has been rejected.

THE COURT: All right. Raise your right hand to be sworn.

(The Defendant was first duly sworn.)

THE COURT: Mr. Harris, you heard what your lawyer just indicated to the court?

THE DEFENDANT: Yes, sir.

THE COURT: Your lawyer has indicated you wish to withdraw your earlier entered plea of not guilty and enter a plea of no contest to the charges that has been brought against you. Is that what you want to do?

THE DEFENDANT: Yes, sir.

THE COURT: And the only condition of your plea is that you're reserving your right to appeal this Court's denial of your motion to suppress. Is that the only condition of your plea?



THE DEFENDANT: Yes, sir.

THE COURT: Now, you understand by entering this plea you're waiving your right to a trial of any kind. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: There is not going to be a trial now?

THE DEFENDANT: Yes, sir.

THE COURT: You're waiving your right to have a lawyer assist you in a trial, to confront witness against you, or call witnesses on your own behalf?

THE DEFENDANT: Yes, sir.

THE COURT: And you're waiving your right to remain silent as to these charges?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand all matters which are appealable at this point are waived by entering this plea, except your right to appeal the denial of the motion to suppress?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you're waiving your right to remain silent, all matters that are appealable at this time, except for the suppression are waived, all of those Constitutional rights that you have when you're charged with a crime are waived, except your right to appeal the denial of this motion to suppress?

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand the maximum penalty which could be imposed for your plea is 15 years in the penitentiary?

THE DEFENDANT: Yes, sir.

THE COURT: Now, has he ever been convicted a crime before?

MS. HALL: Yes, sir. We would ask that we continue this to the next court date for purposes of sentencing. He stated to the arresting officers that he had a bad problem with methamphetamine and that he really needed help for that and he still feels way. And I would like the opportunity -- he has children at home that he has to make arrangements to -- somebody to take care of them, and I would like to go ahead and have him evaluated for a treatment program.

Now, Mr. Harris advises me that the amount of the Pseudoephedrine that he was in possession of at that time would make enough to last him about three days and that this is a personal drug habit that he

has and that he needs help with.

THE COURT: Well, I haven't finished my plea colloquy with him.

MS. HALL: Yes.

THE COURT: I want to be sure he understood the maximum penalty with which could be imposed as a result of the plea. This is a second degree felony punishable by imprisonment in the state penitentiary for 15 years. Do you understand that?

THE DEFENDANT: (Nods head.)

THE COURT: I was trying to find out if he had ever been convicted of any other offenses that might give rise to any enhance penalty?

MS. HALL: Well, I don't believe that he has been --

MR. COMBS: He has got -- we had him before. We ended up sending him to the Department of Corrections back in --

MS. HALL: No. He has never been to the Department of Corrections.

MR. COMBS: Clayton Earl Harris 6/1/71. 6/10/99, three years DOC.

MS. HALL: No.

MR. COMBS: Well, maybe he should have gone to DOC and he wasn't sentenced.

MS. HALL: No. It must have been a suspended sentence.

THE DEFENDANT: It was a suspended sentence, sir.

THE COURT: Pardon?

THE DEFENDANT: I had a suspended sentence. I have never been to DOC.

MR. COMBS: Well, he has had that. He has had some convictions over in Calhoun County. I don't believe that --

MS. HALL: Well, I have--

MR. COMBS: -- he qualifies as a -- on any enhanced sentence, no, sir.

THE COURT: Okay. Are you satisfied with the services rendered to you by your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: All right. I've heard this evidence presented here and I'm satisfied, the Court, there is a factual basis for the plea. Do you stipulate to that, there is a factual basis, Counsel?

MS. HALL: Yes, sir.

THE COURT: The Court does find that there is a factual basis for the plea. That your plea has been entered freely, intelligently, and voluntarily. That I will accept your -- the plea that you've entered.

Mr. Combs, it's requested that the Court defer imposition of sentence.

MR. COMBS: That's fine with me, Judge. I don't have a problem with that. We can call off our jury for Monday. That would be fine with me.

THE COURT: All right. In the meantime, you're going to be exploring the possibility of having a non-state prison sanction, but in lieu of that, having a drug treatment program that will be satisfactory to the State and the Court.

MS. HALL: Yes, sir. That's what I intend to do. And that's what Mr. Harris said he wanted to do from the day he was arrested.

MR. COMBS: But I will just, you know, inform -- make everybody know, I'm looking to send him for his treatment in the Department of Corrections. I'm not backing off of that position at all.

THE COURT: Okay. Next month will be the time that that decision will be made. So, if you are going to find something that's going to be acceptable, it's got to be found right quickly. We can't just keep delaying it forever.

THE DEFENDANT: I understand.

THE COURT: And any witnesses you want to present at a sentencing hearing to satisfy the Court that that should be done rather than going to the penitentiary, have to be available at that time.

MS. HALL: Yes, sir.

THE COURT: So you ought to set this probably at the end of the docket, you know.

MR. COMBS: One o'clock docket.

THE COURT: At the end of the one o'clock docket.

MR. COMBS: Yeah, we can do that.

THE COURT: Madam clerk, you can cancel the jury for Monday.

THE CLERK: Yes, sir.

(The proceeding was concluded.)

## CERTIFICATE

STATE OF FLORIDA:

COUNTY OF LEON:

I, LINDA CUNNINGHAM, Official Court Reporter, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter translated under my supervision; and the foregoing pages are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED this 12th day of January, 2007.

---

LINDA CUNNINGHAM  
OFFICIAL COURT REPORTER  
LEON COUNTY COURTHOUSE  
TALLAHASSEE, FLORIDA 32301



# Certificate of Training

CITY OF APOKA POLICE DEPARTMENT, FLORIDA



*This is to certify that*

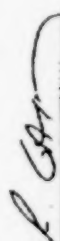
Deputy Sheriff Billy Morris  
and K-9 "Aldo"

*have successfully completed 120 hours in*

**Narcotics Detection**

(In Cannabis, Cocaine HCl, Cocaine Base, Ecstasy, Heroin and Methamphetamine.)

*On this Thirtieth day of January, Two Thousand and Four*

  
Richard K. Galloway, Commander  
State Certified Evaluator/Instructor

  
Paul Rehn  
Assistant Instructor



# K-9 Drug Detection Certification

This certifies accomplishment in  
*K-9 DRUG CERTIFICATION*



Has been achieved on this 13th day of February  
In the year 2004, by William J. Morris Jr. &  
Aldo - A German Shepherd

Drug Beat K-9 Certifications  
2623 W Farm Road 112  
Springfield Missouri 65803  
Phone(417)869-7699  
Fax(417)869-8772

Certifying Agent  
Cameron Ford

Cameron Ford  
Agent

# DRUGBEAT NATIONAL K-9 CERTIFICATIONS

2623 W. Farm Road 112 • Springfield, Missouri 65803 • (417) 869-7699 • [k9cert@drugbeat.com](mailto:k9cert@drugbeat.com) • [www.drugbeat.com](http://www.drugbeat.com)

## NARCOTICS DETECTION CRITIQUING FORM

HANDLER: William J. Mollis Jr. ADDRESS: 100 Bush Blvd  
 CITY: Sanford STATE: NC ZIP: 28773 PHONE: 907 324 9685  
 I am Sheriff Dept. ☐ Police Dept. ☐ OTHER ☐ CERTIFICATION DATE: 2-13

| Type of Drug        | Pounds | Grams | Found? |
|---------------------|--------|-------|--------|
| Marijuana           |        | 28g   | Yes    |
| Methamphetamine     |        | 28g   | Yes    |
| Cocaine             |        | 28g   | Yes    |
| Heroin              |        | 7g    | Yes    |
| Hashish             |        |       |        |
| Crack Cocaine       |        | 7g    | Yes    |
| Medication          |        |       |        |
| Alcoholic Beverages |        |       |        |
| Gun Powder          |        |       |        |
| Ecstasy             |        | 50g   | Yes    |
| Other:              |        |       |        |

☒ PASS  
☐ FAIL

Dog Breed German Shepherd Dog Name Aldo Date 2-13-0

## Instructions for obtaining your 1 year DRUGBEAT certification:

Mail a copy of this critiquing page, along with the certification fee to:

DRUGBEAT National K-9 Certifications  
 2623 W. Farm Road 112  
 Springfield, MO 65803

Make all checks payable to DRUGBEAT. You will receive your 1 year certification within 7 to 10 days. If you need to re-test, please setup a re-test time with your certifying agent for no more than 90 days from today's date.

## CERTIFYING AGENT INFORMATION

NAME: Camron Ford  
 ADDRESS: \_\_\_\_\_  
 CITY: \_\_\_\_\_ STATE: \_\_\_\_\_ ZIP: \_\_\_\_\_  
 DEPT/AGENCY: \_\_\_\_\_  
 ADDRESS: \_\_\_\_\_  
 CITY: \_\_\_\_\_ STATE: \_\_\_\_\_ ZIP: \_\_\_\_\_  
 SIGNATURE: [Signature]

Drug Beat National K-9 Certifications is a subsidiary of Hornback's Training Center and Hornback Video Productions. Copyright © 1999

*Dothan Police Department  
10th Annual K-9 Seminar*

*Todd Wheetley and K-9 Aldo*

*is presented this diploma for completion of the 40 hour*

*Dothan Police Department K-9 Seminar this*

*3rd day of February 2006.*

*[Signature]*  
John E. Powell, Chief of Police

*[Signature]*  
WB Wainak, Canine Trainer

*[Signature]*  
Phil Dodson, Canine Trainer

| POLICE DEPARTMENT<br>MONTHLY CANINE PATROL TRAINING LOG |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
|---------------------------------------------------------|-----|-----------------|-----|-------|------|--------------|---|---|---|---|---|---|---|---|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|---------------------|
| NAME OF DOG                                             | AGE | TIME OF FEEDING | SEX | MONTH | YEAR | DAY OF MONTH |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | TOTAL MONTHLY HOURS |
|                                                         |     |                 |     |       |      | 1            | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 | 31 |                     |
| Aldo                                                    | 4   | Wheeler         |     | 11    | 2005 | 1            | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 | 31 | 112                 |
| TRAINING                                                |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 1. Obedience                                            |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 2. Scent work                                           |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 3. Agility                                              |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 4. Search                                               |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 5. Tracking                                             |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 6. Retrieval                                            |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 7. Stunt work                                           |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 8. Protection                                           |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 9. Other                                                |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 10. Total                                               |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 11. Remarks                                             |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 12. Date                                                |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 13. Time                                                |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 14. Location                                            |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 15. Weather                                             |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 16. Other                                               |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 17. Total                                               |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| UTILIZATION                                             |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 1. Patrol                                               |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 2. Search                                               |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 3. Training                                             |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 4. Other                                                |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| 5. Total                                                |     |                 |     |       |      |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |

## MONTHLY CANINE PATROL TRAINING LOG

[illegible]

# POLICE DEPARTMENT

## MONTHLY CANINE PATROL TRAINING LOG

|                            |                 |                                       |                   |                           |
|----------------------------|-----------------|---------------------------------------|-------------------|---------------------------|
| NAME OF DOG<br><b>Aldo</b> | AGE<br><b>4</b> | NAME OF HANDLER<br><b>T. Wheelley</b> | DAY<br><b>112</b> | MONTH/YEAR<br><b>1/06</b> |
|----------------------------|-----------------|---------------------------------------|-------------------|---------------------------|

DAILY RATINGS: B = SATISFACTORY, U = UNSATISFACTORY (Include deficiency and corrective action in Remarks section)

| TRAINING                           | DATE OF MONTH |   |   |   |   |   |   |   |   |    |    |    | TOTAL MONTHLY HOURS |
|------------------------------------|---------------|---|---|---|---|---|---|---|---|----|----|----|---------------------|
|                                    | 1             | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 |                     |
| 1. ON LEASH OBEEDIENCE             | 5             | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5  | 5  | 5  | 60                  |
| 2. OFF LEASH OBEEDIENCE            | 5             | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5  | 5  | 5  | 60                  |
| 3. CRIMINAL CONTROL                |               |   |   |   |   |   |   |   |   |    |    |    | 0                   |
| 4. CONTROLLED AGGRESSIVENESS (B/U) |               |   |   |   |   |   |   |   |   |    |    |    | 0                   |
| 5. FALLOUT                         |               |   |   |   |   |   |   |   |   |    |    |    | 0                   |
| 6. JUMPING                         |               |   |   |   |   |   |   |   |   |    |    |    | 0                   |
| 7. RETRIEVE                        |               |   |   |   |   |   |   |   |   |    |    |    | 0                   |
| 8. RECALL                          |               |   |   |   |   |   |   |   |   |    |    |    | 0                   |
| 9. BARKING                         |               |   |   |   |   |   |   |   |   |    |    |    | 0                   |
| 10. BARKING MATCH                  |               |   |   |   |   |   |   |   |   |    |    |    | 0                   |
| 11. BARKING MIMICRY                |               |   |   |   |   |   |   |   |   |    |    |    | 0                   |
| 12. BARKING SILENCE                |               |   |   |   |   |   |   |   |   |    |    |    | 0                   |
| 13. TRACKING                       |               |   |   |   |   |   |   |   |   |    |    |    | 0                   |
| 14. APPRAISAL                      |               |   |   |   |   |   |   |   |   |    |    |    | 0                   |
| 15. DETECTION WORK                 |               |   |   |   |   |   |   |   |   |    |    |    | 0                   |
| 16. TOTAL TRAINING TIME FOR DAY    | 5             | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5  | 5  | 5  | 60                  |
| 17. DAILY TRAINING RATING (B/U)    | B             | B | B | B | B | B | B | B | B | B  | B  | B  |                     |

| UTILIZATION          | DATE OF MONTH |    |    |    |    |    |    |    |    |    |    |    | TOTAL MONTHLY HOURS |
|----------------------|---------------|----|----|----|----|----|----|----|----|----|----|----|---------------------|
|                      | 1             | 2  | 3  | 4  | 5  | 6  | 7  | 8  | 9  | 10 | 11 | 12 |                     |
| 1. TOTAL HOURS       | 12            | 12 | 12 | 12 | 12 | 12 | 12 | 12 | 12 | 12 | 12 | 12 | 144                 |
| 2. BARKING MATCH     |               |    |    |    |    |    |    |    |    |    |    |    | 0                   |
| 3. BARKING SILENCE   |               |    |    |    |    |    |    |    |    |    |    |    | 0                   |
| 4. TRACKING          |               |    |    |    |    |    |    |    |    |    |    |    | 0                   |
| 5. APPRAISAL         |               |    |    |    |    |    |    |    |    |    |    |    | 0                   |
| 6. DETECTION WORK    |               |    |    |    |    |    |    |    |    |    |    |    | 0                   |
| 7. TOTAL HOURS (B/U) |               |    |    |    |    |    |    |    |    |    |    |    | 0                   |



# POLICE DEPAR. MONTHLY CANINE DETECTION TRAINING LOG

|             |     |                    |      |
|-------------|-----|--------------------|------|
| NAME OF DOG | AGE | NAME OF HANDLER    | DOB  |
| Wido        |     | William T. Dineley | 112  |
|             |     |                    | 2/26 |

ATTACH AND PLACE LOG WITH REMARKS AND NOTATIONS

| TRAINING                            |         | DATE OF MONTH |    | TOTAL MONTHLY HOURS |    |
|-------------------------------------|---------|---------------|----|---------------------|----|
| REMARKS                             | REMARKS | 1             | 2  | 3                   | 4  |
| BUILDINGS                           | REMARKS | 5             | 6  | 7                   | 8  |
| HOUSES                              | REMARKS | 9             | 10 | 11                  | 12 |
| VEHICLES                            | REMARKS | 13            | 14 | 15                  | 16 |
| OPEN AREA                           | REMARKS | 17            | 18 | 19                  | 20 |
| OTHER                               | REMARKS | 21            | 22 | 23                  | 24 |
| UTILITIES                           | REMARKS | 25            | 26 | 27                  | 28 |
| TOTAL TRAINING TIME FOR THIS MONTH  |         | 29            | 30 | 31                  | 32 |
| TOTAL TRAINING HOURS FOR THIS MONTH |         | 33            | 34 | 35                  | 36 |

THIS LOG MUST BE SUBMITTED TO THE SUPERVISOR BY THE 10TH OF THE FOLLOWING MONTH

# POLICE DEPAR. MONTHLY CANINE DETECTION TRAINING LOG

|             |                    |         |
|-------------|--------------------|---------|
| NAME OF DOG | NAME OF HANDLER    | DATE    |
| Alda        | William T. Whetley | 12/3/06 |

ATTACH AND PLACE IN LOG WITH REFERENCE AND NOTATIONS

| TRAINING                      |         | DAY OF MONTH |   |   |   |   |   |   |   |   |    |    |    | TOTAL MONTHLY HOURS |    |    |    |    |    |    |    |    |    |    |    |
|-------------------------------|---------|--------------|---|---|---|---|---|---|---|---|----|----|----|---------------------|----|----|----|----|----|----|----|----|----|----|----|
| TYPE                          | REMARKS | 1            | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13                  | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 |
| BUILDINGS                     |         | 4            | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4  | 4  | 4  | 4                   | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  |
| VEHICLES                      |         | 4            | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4  | 4  | 4  | 4                   | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  |
| OPEN AREA                     |         | 4            | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4  | 4  | 4  | 4                   | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  |
| OTHER                         |         | 4            | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4  | 4  | 4  | 4                   | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  |
| UNRECORDED                    |         | 4            | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4  | 4  | 4  | 4                   | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  |
| TOTAL TRAINING TIME FOR DAY   |         | 4            | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4  | 4  | 4  | 4                   | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  |
| TOTAL TRAINING TIME FOR MONTH |         | 4            | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4  | 4  | 4  | 4                   | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  | 4  |

FOR 1 DAY TRAINING IN 1 DAY ACTIVITY 10 - 1000000 ACTIVITY

| POLICE DEPARTMENT<br>MONTHLY CANINE DETECTION TRAINING LOG |     |                     |           |
|------------------------------------------------------------|-----|---------------------|-----------|
| NAME OF DOG                                                | AGE | NAME OF HANDLER     | DATE      |
| Aldo                                                       |     | William T. Wheatley | L-12 4/66 |

JA - 111

**POLICE DEPARTMENT**  
MONTHLY CANINE DETECTION TRAINING LOG

|                            |                                  |                                 |                     |
|----------------------------|----------------------------------|---------------------------------|---------------------|
| NAME OF DOG<br><b>Aldo</b> | AGE<br><b>William T. Whately</b> | GRADE OF HANDLER<br><b>L-12</b> | DATE<br><b>5/06</b> |
|----------------------------|----------------------------------|---------------------------------|---------------------|

ATTACH AND PLACE LOG WITH REMARKS AND NOTATIONS

| TRAINING                      |             | DAY OF MONTH |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | TOTAL MONTHLY HOURS |
|-------------------------------|-------------|--------------|---|---|---|---|---|---|---|---|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|---------------------|
|                               |             | 1            | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 | 31 |                     |
| BUILDINGS                     | AGE         |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
|                               | TIME        |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
|                               | SEARCH TIME |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| HOUSES                        | AGE         |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
|                               | TIME        |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
|                               | SEARCH TIME |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| VEHICLES                      | AGE         |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
|                               | TIME        |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
|                               | SEARCH TIME |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| OPEN AREA                     | AGE         |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
|                               | TIME        |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
|                               | SEARCH TIME |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| OTHER                         | AGE         |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
|                               | TIME        |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
|                               | SEARCH TIME |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| LOOSEBORN                     | AGE         |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
|                               | TIME        |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
|                               | SEARCH TIME |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| TOTAL TRAINING TIME FOR DAY   |             |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |
| TOTAL TRAINING TIME FOR MONTH |             |              |   |   |   |   |   |   |   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |                     |

THIS REPORT IS TO BE RETURNED TO THE COMMANDER

# POLICE DEPARTMENT MONTHLY CANINE DETECTION TRAINING LOG

|                            |     |                                             |                     |                     |
|----------------------------|-----|---------------------------------------------|---------------------|---------------------|
| NAME OF DOG<br><b>Aldo</b> | AGE | NAME OF HANDLER<br><b>William T. Wietky</b> | DATE<br><b>6-11</b> | TIME<br><b>6:30</b> |
|----------------------------|-----|---------------------------------------------|---------------------|---------------------|

ATTACH AND PLACE LOG WITH REMARKS AND NOTATIONS

| TRAINING                      |         | DATE OF MONTH |   | TOTAL TRAINING HOURS |   |
|-------------------------------|---------|---------------|---|----------------------|---|
| TYPE                          | REMARKS | 1             | 2 | 3                    | 4 |
| BUILDINGS                     |         |               |   |                      |   |
| FRONT                         |         |               |   |                      |   |
| REAR                          |         |               |   |                      |   |
| HOUSE                         |         |               |   |                      |   |
| FRONT                         |         |               |   |                      |   |
| REAR                          |         |               |   |                      |   |
| VEHICLES                      |         |               |   |                      |   |
| FRONT                         |         |               |   |                      |   |
| REAR                          |         |               |   |                      |   |
| OPEN AREA                     |         |               |   |                      |   |
| FRONT                         |         |               |   |                      |   |
| REAR                          |         |               |   |                      |   |
| OTHER                         |         |               |   |                      |   |
| FRONT                         |         |               |   |                      |   |
| REAR                          |         |               |   |                      |   |
| LITERATURE                    |         |               |   |                      |   |
| FRONT                         |         |               |   |                      |   |
| REAR                          |         |               |   |                      |   |
| TOTAL TRAINING TIME FOR DAY   |         | 4             | 5 | 4                    | 5 |
| TOTAL TRAINING TIME FOR MONTH |         | 4             | 5 | 4                    | 5 |

# **POLICE DEPAR.** MONTHLY CANINE DETECTION TRAINING LOG

|                            |                                             |                     |                     |
|----------------------------|---------------------------------------------|---------------------|---------------------|
| NAME OF DOG<br><b>Aldo</b> | NAME OF HANDLER<br><b>William T. Whelan</b> | DATE<br><b>6-11</b> | TIME<br><b>7:00</b> |
|----------------------------|---------------------------------------------|---------------------|---------------------|

ATTACH AND PLACE IN LOG WITH APPLICABLE AND NOTATIONS

| TRAINING                      |             | RECORD                        |             | TOTAL                         |             |
|-------------------------------|-------------|-------------------------------|-------------|-------------------------------|-------------|
| DATE                          | TIME        | DATE                          | TIME        | DATE                          | TIME        |
| BUILDINGS                     | SEARCH TIME | BUILDINGS                     | SEARCH TIME | BUILDINGS                     | SEARCH TIME |
| HOUSES                        | SEARCH TIME | HOUSES                        | SEARCH TIME | HOUSES                        | SEARCH TIME |
| VEHICLES                      | SEARCH TIME | VEHICLES                      | SEARCH TIME | VEHICLES                      | SEARCH TIME |
| OPEN AREA                     | SEARCH TIME | OPEN AREA                     | SEARCH TIME | OPEN AREA                     | SEARCH TIME |
| OTHER                         | SEARCH TIME | OTHER                         | SEARCH TIME | OTHER                         | SEARCH TIME |
| UNRECORDED                    | SEARCH TIME | UNRECORDED                    | SEARCH TIME | UNRECORDED                    | SEARCH TIME |
| TOTAL TRAINING TIME FOR DAY   |             | TOTAL TRAINING TIME FOR DAY   |             | TOTAL TRAINING TIME FOR DAY   |             |
| TOTAL TRAINING TIME FOR MONTH |             | TOTAL TRAINING TIME FOR MONTH |             | TOTAL TRAINING TIME FOR MONTH |             |

| POLICE DEPARTMENT<br>MONTHLY CANINE DETECTION TRAINING LOG |      |                     |      |       |
|------------------------------------------------------------|------|---------------------|------|-------|
| NAME OF DOG                                                | DATE | NAME OF HANDLER     | DATE | SCORE |
| Aldo                                                       |      | William T. Wheeling | L-11 | 6/26  |

[illegible]



# POLICE DEPARTMENT MONTHLY CANINE DETECTION TRAINING LOG

|                                 |                                              |                     |      |
|---------------------------------|----------------------------------------------|---------------------|------|
| TRAINING OFFICER<br><i>Algo</i> | NAME OF HANDLER<br><i>William T. Whelley</i> | DATE<br><i>5/11</i> | 5/06 |
|---------------------------------|----------------------------------------------|---------------------|------|

ATTACH TO PLACEMENT LOG WITH REWARDS AND NOTATIONS

| TRAINING                       |             |      | DAY OF MONTH |   |   |   |   |   |   |   |   |    |    |    | TOTAL MONTHLY HOURS |   |   |   |   |   |   |   |   |    |    |    |
|--------------------------------|-------------|------|--------------|---|---|---|---|---|---|---|---|----|----|----|---------------------|---|---|---|---|---|---|---|---|----|----|----|
| BUILDINGS                      | AREA        | TIME | 1            | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 1                   | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 |
|                                | SEARCH TIME |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
|                                |             |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
| HOUSES                         | AREA        | TIME |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
|                                | SEARCH TIME |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
|                                |             |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
| VEHICLES                       | AREA        | TIME |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
|                                | SEARCH TIME |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
|                                |             |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
| OTHER AREA                     | AREA        | TIME |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
|                                | SEARCH TIME |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
|                                |             |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
| OTHER                          | AREA        | TIME |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
|                                | SEARCH TIME |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
|                                |             |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
| UNUSUAL                        | SEARCH TIME |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
|                                | TIME        |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
|                                | SEARCH TIME |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
| TOTAL TRAINING TIME FOR DAY    |             |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
| TOTAL TRAINING HOURS FOR MONTH |             |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |
| TOTAL OF MONTH                 |             |      |              |   |   |   |   |   |   |   |   |    |    |    |                     |   |   |   |   |   |   |   |   |    |    |    |

ONLY TO BE USED IN PLACEMENT LOG WITH REWARDS AND NOTATIONS

In the Circuit Court, Second Judicial Circuit,  
In and for Liberty County, Florida

Division: Felony

State of Florida

v.

Clayton E. Harris

Defendant

Case No. 06-042-CF

     Probation Violator

     Community Control Violator

     Retrial

     Resentence

---

### JUDGMENT

---

The Defendant, Clayton E. Harris, being personally before this court represented by, Judy Hall, P. D., attorney of record, and the state represented by, Richard Combs, and having

     been tried and found guilty by jury/by court of the following crime(s)

     entered a plea of guilty to the following crime(s)

  X   entered a plea of nolo contendere to the following crime(s)

| Co<br>unt | Crime                                              | Offense<br>Statue<br>Number(s) | Degree<br>Of<br>Crime | Case<br>No.       | OBTS<br>No. |
|-----------|----------------------------------------------------|--------------------------------|-----------------------|-------------------|-------------|
| 1         | Unlawf<br>ul<br>possessi<br>on of<br>Chemic<br>als | 893.149<br>(1)(a)              | F2                    | 06-<br>042-<br>CF |             |

X and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED that the defendant is hereby ADJUDICATED GUILTY as to all counts or as to counts(s) 1

       and having been convicted of an attempt of offense enumerated in section 943.325, the defendant shall be required to submit two specimens of blood or other biological specimens to the Department of Law Enforcement as provided by law

       and good cause being shown; IT IS ORDERED that ADJUDICATION OF GUILT BE WITHHELD as to all counts or as to count(s)       

Page     of    

Rev. 06/30/04

Defendant     Clayton Harris

Case Number

OBTS Number

**SENTENCE**

(As to Count   1 )

The defendant, being personally before this court, accompanied by the defendant's attorney of record, Judy Hall, P.D., and having been given an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law; and no cause being shown

*(Check one if applicable)*

\_\_\_\_\_ the Court places the defendant on probation/community control for a period of \_\_\_\_\_ months/years under the supervision of the Dept. of Corrections, the conditions of which are set forth in a separate order.

\_\_\_\_\_ the Court having previously on \_\_\_\_\_, deferred imposition of sentence until this date.

\_\_\_\_\_ the Court having previously entered a judgment in this case on \_\_\_\_\_ now resentsences the defendant

\_\_\_\_\_ the Court having placed the defendant on probation/community control and having subsequently    revoked    the    defendant's

probation/community control.

**It Is The Sentence of The Court that:**

\_\_\_\_\_ The defendant pay a fine of \$\_\_\_\_\_, pursuant to section 775.083, F.S., plus \$\_\_\_\_ as the 5% surcharge required by section 938.04, F.S.

X The defendant is committed to the custody of the Department of Corrections.

\_\_\_\_\_ The defendant is directed to the custody of the Sheriff of \_\_\_\_\_ County, Florida.

\_\_\_\_\_ The defendant is sentenced as a youthful offender in accordance with section 958.04, F.S..

**To Be Imprisoned (Check one; unmarked sections are inapplicable):**

\_\_\_\_\_ For a term of natural life.

X For a term of 24 months/~~years~~.

\_\_\_\_\_ Said SENTENCE SUSPENDED for a period of \_\_\_\_\_ subject to the conditions set forth in this order.

**If "split" sentence, complete the appropriate paragraph.**

\*First 3 years Drug Offender Probation & then

2 years Regular Probation

X Followed by a period of 5 years\* on probation/~~community—control~~ under the supervision of the Department of Corrections according to the terms and conditions set forth in a separate order entered herein.

\_\_\_\_\_ However, after serving a period of \_\_\_\_\_ imprisonment in \_\_\_\_\_, the balance of the sentence shall be suspended and the defendant be placed on probation/community control for a period of \_\_\_\_\_ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before defendant begins service of the supervision terms.

Page \_\_\_\_\_ of \_\_\_\_\_

Rev. 06/30/04

IN THE CIRCUIT COURT OF  
THE SECOND JUDICIAL  
CIRCUIT, IN AND FOR  
LIBERTY COUNTY, FLORIDA

CASE NO.: 06-CF-42

STATE OF FLORIDA

vs.

CLAYTON HARRIS,  
Defendant.

---

PROCEEDINGS: SENTENCING

BEFORE: THE HONORABLE RALPH  
SMITH, JR.

DATE: November 9, 2006

LOCATION: Liberty County Courthouse  
Bristol, Florida

REPORTED BY: CLAVETTE A. DONNELL  
Official Court Reporter

CLAVETTE A. DONNELL  
Official Court Reporter  
Leon County Courthouse, Room 341  
Tallahassee, FL 32301



APPEARANCES

REPRESENTING THE STATE:

RICHARD COMBS, ASSISTANT STATE  
ATTORNEY OFFICE OF THE STATE  
ATTORNEY  
1 EAST JEFFERSON STREET  
QUINCY, FLORIDA 32351

REPRESENTING THE DEFENDANT:

JUDY HALL, ASSISTANT PUBLIC  
DEFENDER  
OFFICE OF THE PUBLIC DEFENDER  
24 NORTH ADAMS STREET, SUITE #1  
QUINCY, FLORIDA 32351

## PROCEEDINGS

MR. COMBS: The next item, Judge, is Clayton Harris, a sentencing. Mr. Harris entered a plea straight up last time, and we are here to sentence him today.

MS. HALL: Your Honor, I have to present to the court a letter stating that he has been accepted into NPI for treatment should that be the Court's order.

MR. COMBS: What is the date of that letter?

MS. HALL: November 2nd. The -- I feel -- I am very upset because his sister-in-law sat here since 1:00 and finally had to leave to go pick up her children. And I am going to have to proffer what her testimony would have been to the court. Tell me her name.

THE DEFENDANT: Anna Hill.

MS. HALL: Anna Hill. I just talked with her at some length, and she advised me that Clayton has made a lot of efforts to get into a treatment program before this ever happened. She said that he went to the church and prayed there for help. He called treatment centers. All of this before he was arrested. Asking them can he get admitted and they say no insurance, no. And I think Mr. Harris can tell you about contacts he made with the sheriff's department.

THE DEFENDANT: Yes, Sir. I made contact

with the sheriff's department over in Calhoun County asking for ways I could get to a treatment center through them. And they advised me it would have to be court ordered. If it wasn't court ordered, there was nothing I could do without paying a bunch of money to get in one.

MS. HALL: And which county did you talk to?

THE DEFENDANT: Calhoun.

MS. HALL: In Calhoun County. And I think it's -- to back up the truthfulness of what he is saying, in the police report when he was arrested on this offense, the officers report that --

THE COURT: Do you have score sheet for him, Mr. Combs?

MR. COMBS: Yes, sir.

MS. HALL: Judge, I haven't seen a score sheet. It hasn't been proffered to the defense.

MR. COMBS: The Court may want to inquire of Mr. Harris whether he has had any subsequent arrests since June 24th of 2006.

MS. HALL: Your Honor, just to finish up what I was saying. In the police report it says, Harris went on to state that he can't go more than a few days without using meth and that he has a big problem with his addiction and he has been seeking help for this addiction for a long time. And they told him until

you get arrested and the court orders you, you can't get help. And that is true. Unless you have insurance or a lot of money, there is no way for him to get that treatment. And he even went to the sheriff's, people he knows in the sheriff's department and said, I need help. How do you get it? And all that -- he did all of that before he got this arrest.

And, yes, he does have another arrest pending in Calhoun County. But I am not sure if it was before this or subsequent

MR. COMBS: You might be able to ask him. He ought to know

MS. HALL: And there is no doubt that he has a very serious addiction problem. And contrary to many of the people we have in this courtroom where we all know they need help and they are saying no I don't, I can do just fine without it, Mr. Harris is the exception. He is the one that is saying I do need help. And I have been asking for it a long time. So that's all I have to say. I think he would like to make a statement, too.

THE DEFENDANT: Your Honor, when I first started using meth, I wasn't aware of the risk, how addictive it was. I kind of used it as a tool at my work. It would give me energy. And the longer I used it, the more I become dependent on it. And without even knowing, I became completely dependent on it where I couldn't get up out of bed without it. In manufacturing it, I never sold any to anybody. I never give any to anybody. It was strictly to feed my

addiction, myself. And I wasn't in my right mind when I was doing it.

Now I can't believe the things I did when I was on it. It tore up my family. It destroyed my work. It has completely torn my family apart. All I wanted for a long time -- once I realize what was happening, I wanted help. And it was no way I could afford to do it without going to jail first. It had a complete hold on me.

THE COURT: Anything further, Ms. Hall?

MS. HALL: No, sir.

THE COURT: Mr. Combs.

MR. COMBS: Judge, Mr. Harris does have some history about this. We had Mr. Harris here on a possession with intent to sell. Convicted him. He was given --

THE COURT: When was that conviction?

MR. COMBS: '97. He was placed on probation.

MS. HALL: What drug was that?

MR. COMBS: Marijuana.

MS. HALL: Marijuana.

MR. COMBS: He was placed on probation for

the jail sentence. Part of probation was some outpatient treatment. He violated, and we sentenced him to three years -- actually, I don't know if we sentenced him to DOC or put him on community control. I can't quite --

MS. HALL: No, he never --

THE DEFENDANT: Community control. I have never been to DOC.

MR. COMBS: He violated on that time. He also has numerous offenses over in other counties for drug offenses. One thing I noted --

MS. HALL: No he doesn't. It is one.

MR. COMBS: One thing I noted, Judge, is that you notice there he has 17 traffic convictions. He has a four-page traffic record. One of the more outstanding things -- Mr. Harris seems to have some difficulty in conducting himself within the parameters society sets. In this particular case, he was a cooker, a cooker of the most dangerous substance we have right now, the biggest problem this county is going to be facing is people start cooking this meth and creating hazardous conditions for law enforcement and the neighbors and the kids and the family. Anybody who is involved in cooking methamphetamine probably should be considered the most serious of all drug offenders, not only by the acts that they commit in order to obtain the substances, but the very nature of it. And the process they go through creates tremendous risk to lots of other people. And, you

know, like everybody, there is this common thread that they like to say well, this is a victimless crime, he is only hurting themselves. And that is a bunch of malarkey. And it is really a bunch of malarkey when we are talking about methamphetamine. And it needs to be -- and the only way we are going to deal with it is to deal with it seriously.

So my position on anybody who is a cooker regardless of if no prior record, I think there needs to be substantial incarcerations. And somebody with Mr. Harris' track record of violating the law -- then while we are pending trial or pending hearings on this, he gets arrested in Calhoun County for possession of hydrocodone. That is the charge he has got pending over there. You know just kind of blithely ignored that --

MS. HALL: Well, he is not convicted of that. Whether he is guilty of that or not remains to be seen.

MR. COMBS: But I think

THE COURT: When was that charge brought, Mr. Combs.

MR. COMBS: August 19 of '06, he was arrested for possession of hydrocodone. I don't know what else. And there may be other things over there, Judge. That is just the only thing that came to my attention is that --

MS. HALL: There are no other things.



MR. COMBS: -- that he had that. Because basically what happened after we set this for sentencing, I had to call over to Calhoun County, what do you know about Clayton Harris? Oh, we arrested him August 19, '06 for possession of hydrocodone. That was the information they were able to give me concerning Mr. Harris.

So based upon all of that, Judge, I submit that, you know, drug treatment is fine, but incarceration is necessary for an individual that is dealing in this substance.

MS. HALL: Your Honor, he is not dealing in it.

THE DEFENDANT: Never.

MS. HALL: And he does not score prison. And I would just reiterate that if anybody deserves treatment, it would be Mr. Harris.

THE COURT: What period of incarceration does the state recommend?

MR. COMBS: I am recommending a period in the Department of Corrections of, two years Department of Corrections followed by five years of probation within the drug treatment.

THE COURT: Felony drug offender probation?

MR. COMBS: Yes, sir.

MS. HALL: Your Honor, I -- he doesn't score,

even score prison on this. I don't know how the State can make such an emphasis on the guideline score sheet when it is to their benefit and then try to totally ignore it when it recommends no prison.

THE COURT: These guidelines aren't caps on what the Court can do?

MS. HALL: No, they are not, Your Honor. They are recommendations.

THE COURT: I think Mr. Harris does have a serious problem and going back to '97 with possession with intent to sell, felony two conviction, and continuing up to the present time. Whatever probation has been imposed before today has been totally ineffective.

MS. HALL: Judge, he completed his community --

THE COURT: Pardon?

MS. HALL: He completed his house arrest.

THE DEFENDANT: Two years of community control.

THE COURT: None of this has done any good if he has now gone into cooking methamphetamines and using. And by his own testimony, he is addicted to methamphetamines.

The court does adjudicate him guilty of the

offense of possession of illegal, unlawful possession of illegal chemicals. And the court does commit him to custody of the Department of Corrections for 24 months. The Court will recommend to the Department while he is incarcerated that they place him in an institution where he can receive treatment for his substance abuse. Upon his release from incarceration to be placed on five years of probation. The first three years being felony drug offender probation. If he has not been accorded any treatment while he is in prison or if an evaluation when he is released shows he needs additional treatment, that he comply fully with recommendations from the probation officer for treatment and after-care treatment, that he abstain from the use of any illegal drugs or alcohol and submit to random urinalysis. And during the felony drug offender probation, he will observe a curfew of 7:00 p.m. to 7:00 a.m. Standard court costs will be imposed, he will be given credit for time served. How much credit does he have, Ms. Hall?

MS. HALL: Twenty-three days.

THE COURT: Be given credit for 23 days time served. You have a right to appeal. If you desire to do so, you need to file a notice of appeal within 30 days. If you cannot afford a lawyer, the court will appoint one for you at the public's expense.

MS. HALL: Your Honor, is it possible for him to get things straightened out for him to -- before he goes to DOC?

THE DEFENDANT: Turn myself in on the weekend.

THE COURT: Mr. Combs?

MR. COMBS: Judge, considering that he as gotten an arrest for some substance abuse since he was released from our jail before, I would be opposed to that. I think his way of doing business may be to load up for one last binge, and that would be the worst thing that could happen for him.

THE DEFENDANT: I have three small kids. I would like to situate things with them if only for a day.

THE COURT: Report to the sheriff tomorrow by five o'clock.

THE DEFENDANT: Thank you, sir.

MS. HALL: Thank you, Judge.

(Proceedings concluded.)

## CERTIFICATE

STATE OF FLORIDA:

COUNTY OF LEON:

I, CLAVETTE A. DONNELL, Court Reporter, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter translated under my supervision; and the foregoing pages are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED this 12th day of December,  
2006.

/s/

CLAVETTE A. DONNELL  
OFFICIAL COURT REPORTER  
LEON COUNTY COURTHOUSE  
TALLAHASSEE, FLORIDA 32301

# **PETITIONER'S BRIEF**

JUN 25 2012

No. 11-817

In the  
Supreme Court of the United States

STATE OF FLORIDA,

*Petitioner,*

v.

CLAYTON HARRIS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

GREGORY G. GARRE

*Counsel of Record*

BRIAN D. SCHMALZBACH\*

*Special Assistant*

*Attorneys General*

LATHAM & WATKINS LLP

555 Eleventh Street, NW

Suite 1000

Washington, DC 20004

(202) 637-2207

gregory.garre@lw.com

\* Admitted only in

Maryland; all work

supervised by a member of

the DC Bar

PAMELA JO BONDI

*Attorney General of*

*Florida*

CAROLYN M. SNURKOWSKI

*Associate Deputy*

*Attorney General*

ROBERT J. KRAUSS

*Chief-Assistant*

*Attorney General*

SUSAN M. SHANAHAN

*Assistant Attorney General*

OFFICE OF THE ATTORNEY

GENERAL

3507 E. Frontage Road

Suite 200

Tampa, FL 33607-7013

*Counsel for Petitioner*



## QUESTION PRESENTED

Whether the Florida Supreme Court has decided an important federal question in a way that conflicts with the established Fourth Amendment precedent of this Court by holding that an alert by a well-trained narcotics-detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle?

## TABLE OF CONTENTS

|                                                                                                                                                | Page |
|------------------------------------------------------------------------------------------------------------------------------------------------|------|
| OPINIONS BELOW .....                                                                                                                           | 1    |
| JURISDICTION .....                                                                                                                             | 1    |
| CONSTITUTIONAL PROVISIONS<br>INVOLVED .....                                                                                                    | 1    |
| STATEMENT OF THE CASE .....                                                                                                                    | 2    |
| SUMMARY OF ARGUMENT .....                                                                                                                      | 8    |
| ARGUMENT .....                                                                                                                                 | 11   |
| THE FLORIDA SUPREME COURT ERRED<br>IN HOLDING THAT AN ALERT BY A<br>WELL-TRAINED DRUG-DETECTION DOG<br>FAILS TO ESTABLISH PROBABLE CAUSE ..... | 11   |
| A. Probable Cause Is A Flexible,<br>Common-Sense Standard That<br>Depends On Fair Probabilities And<br>Not Hard Certainties .....              | 11   |
| B. An Alert By A Well-Trained Drug-<br>Detection Dog Establishes Probable<br>Cause To Search .....                                             | 15   |
| 1. For Millennia, It Has Been<br>Known That Dogs Have A<br>Superior Sense Of Smell .....                                                       | 16   |
| 2. An Alert By A Well-Trained<br>Drug-Detection Dog Creates At<br>Least A Fair Probability That<br>Contraband Exists .....                     | 19   |
| C. None Of The Factors Relied Upon<br>By The Florida Supreme Court<br>Warrant Any Different Rule .....                                         | 25   |

## TABLE OF CONTENTS—Continued

|                                                                                                                                                                | Page |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 1. Records Of A Well-Trained Dog's<br>Field Performance Are Not<br>Required.....                                                                               | 25   |
| 2. The Possibility Of Alerts To<br>Residual Odors Does Not Negate<br>Probable Cause.....                                                                       | 29   |
| 3. The Absence Of Uniform<br>Standards For Training Or<br>Certification Provides No Reason<br>To Require Courts To Conduct<br>Mini-Trials On Dog Training..... | 32   |
| D. The Florida Supreme Court's Rigid<br>And Burdensome Rule Would<br>Impose Substantial and<br>Unjustifiable Costs.....                                        | 33   |
| E. Probable Cause Existed To Search<br>Respondent's Vehicle.....                                                                                               | 36   |
| CONCLUSION .....                                                                                                                                               | 40   |

## TABLE OF AUTHORITIES

Page(s)

## CASES

|                                                                 |                |
|-----------------------------------------------------------------|----------------|
| <i>Alabama v. White</i> ,<br>496 U.S. 325 (1990) .....          | 27             |
| <i>Arizona v. Evans</i> ,<br>514 U.S. 1 (1995) .....            | 13             |
| <i>Blair v. Kentucky</i> ,<br>204 S.W. 67 (Ky. 1918) .....      | 17, 18         |
| <i>Bond v. United States</i> ,<br>529 U.S. 334 (2000) .....     | 31             |
| <i>Brinegar v. United States</i> ,<br>338 U.S. 160 (1949) ..... | 12, 33         |
| <i>California v. Carney</i> ,<br>471 U.S. 386 (1986) .....      | 11             |
| <i>Carroll v. United States</i> ,<br>267 U.S. 132 (1925) .....  | 11, 12, 24, 33 |
| <i>Colorado v. Unruh</i> ,<br>713 P.2d 370 (Colo. 1986) .....   | 34             |
| <i>Devenpeck v. Alford</i> ,<br>543 U.S. 146 (2004) .....       | 13, 39         |
| <i>Draper v. United States</i> ,<br>358 U.S. 307 (1959) .....   | 15, 27         |

## TABLE OF AUTHORITIES—Continued

|                                                                             | Page(s)       |
|-----------------------------------------------------------------------------|---------------|
| <i>Florida v. J.L.</i> ,<br>529 U.S. 266 (2000) .....                       | 27            |
| <i>Florida v. Royer</i> ,<br>460 U.S. 491 (1983) .....                      | 20            |
| <i>Florida v. Thomas</i> ,<br>532 U.S. 774 (2001) .....                     | 1             |
| <i>Herring v. United States</i> ,<br>555 U.S. 135 (2009) .....              | 35            |
| <i>Hill v. California</i> ,<br>401 U.S. 797 (1971) .....                    | 13            |
| <i>Hudson v. Michigan</i> ,<br>547 U.S. 586 (2006) .....                    | 34            |
| <i>Illinois v. Caballes</i> ,<br>543 U.S. 405 (2005) .....                  | 9, 20, 22, 30 |
| <i>Illinois v. Gates</i> ,<br>462 U.S. 213 (1983) .....                     | passim        |
| <i>Illinois v. Wardlow</i> ,<br>528 U.S. 119 (2000) .....                   | 30            |
| <i>Maryland v. Cabral</i> ,<br>859 A.2d 285 (Md. Ct. Spec. App. 2004) ..... | 27            |

## TABLE OF AUTHORITIES—Continued

|                                                                        | Page(s)       |
|------------------------------------------------------------------------|---------------|
| <i>Maryland v. Pringle</i> ,<br>540 U.S. 366 (2005) .....              | 12, 13, 29    |
| <i>Maryland v. Wallace</i> ,<br>812 A.2d 291 (Md. 2002) .....          | 21            |
| <i>McCray v. Illinois</i> ,<br>386 U.S. 300 (1967) .....               | 14            |
| <i>Michigan v. Long</i> ,<br>463 U.S. 1032 (1983) .....                | 23            |
| <i>Oregon v. Foster</i> ,<br>252 P.3d 292 (Or. 2011) .....             | 21, 30, 31    |
| <i>Ornelas v. United States</i> ,<br>517 U.S. 690 (1996) .....         | 14            |
| <i>South Dakota v. Nguyen</i> ,<br>726 N.W.2d 871 (S.D. 2007) .....    | 26            |
| <i>Texas v. Brown</i> ,<br>460 U.S. 730 (1983) .....                   | <i>passim</i> |
| <i>United States v. Boxley</i> ,<br>373 F.3d 759 (6th Cir. 2004) ..... | 30            |
| <i>United States v. Daniel</i> ,<br>982 F.2d 146 (5th Cir. 1993) ..... | 21            |

## TABLE OF AUTHORITIES—Continued

|                                                                                                      | Page(s) |
|------------------------------------------------------------------------------------------------------|---------|
| <i>United States v. Funds in the Amount of</i><br>\$30,670,<br>403 F.3d 448 (7th Cir. 2005) .....    | 31      |
| <i>United States v. Funds in the Amount of</i><br>\$242,484,<br>389 F.3d 1149 (11th Cir. 2004) ..... | 28      |
| <i>United States v. Harris</i> ,<br>403 U.S. 573 (1971) .....                                        | 15      |
| <i>United States v. Johns</i> ,<br>469 U.S. 478 (1985) .....                                         | 20      |
| <i>United States v. Kennedy</i> ,<br>131 F.3d 1371 (10th Cir. 1997) .....                            | 21      |
| <i>United States v. Kitchell</i> ,<br>653 F.3d 1206 (10th Cir. 2011) .....                           | 28      |
| <i>United States v. Leon</i> ,<br>468 U.S. 897 (1984) .....                                          | 34, 35  |
| <i>United States v. Ludwig</i> ,<br>641 F.3d 1243 (10th Cir. 2011) .....                             | passim  |
| <i>United States v. Meyer</i> ,<br>536 F.2d 963 (1st Cir. 1976) .....                                | 21      |



## TABLE OF AUTHORITIES—Continued

|                                                                                | Page(s)    |
|--------------------------------------------------------------------------------|------------|
| <i>United States v. Olivera-Mendez</i> ,<br>484 F.3d 505 (8th Cir. 2007) ..... | 21         |
| <i>United States v. Place</i> ,<br>462 U.S. 696 (1982) .....                   | 20, 22, 30 |
| <i>United States v. Robinson</i> ,<br>707 F.2d 811 (4th Cir. 1983) .....       | 21, 39     |
| <i>United States v. Sentovich</i> ,<br>677 F.2d 834 (11th Cir. 1982) .....     | 21         |
| <i>United States v. Venema</i> ,<br>563 F.2d 1003 (10th Cir. 1977) .....       | 21         |
| <i>United States v. Ventresca</i> ,<br>380 U.S. 102 (1965) .....               | 15, 20, 28 |
| <i>Wyoming v. Houghton</i> ,<br>526 U.S. 295 (1999) .....                      | 11         |

## CONSTITUTIONAL AND STATUTORY PROVISIONS

|                                   |               |
|-----------------------------------|---------------|
| U.S. Const. amend. IV .....       | <i>passim</i> |
| U.S. Const. amend. XIV, § 1 ..... | 2             |
| 28 U.S.C. § 1257(a) .....         | 1             |

## TABLE OF AUTHORITIES—Continued

Page(s)

## OTHER AUTHORITIES

|                                                                                                                                                                                                                                                                                                                                                                                                              |        |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| Jessica Anderson, <i>Four-Footed Arson</i><br><i>Detectives Work Across the State</i> , Balt. Sun,<br>Dec. 27, 2010.....                                                                                                                                                                                                                                                                                     | 19     |
| Robert C. Bird, <i>An Examination of the</i><br><i>Training and Reliability of the Narcotics</i><br><i>Detection Dog</i> , 85 Ky. L.J. 405 (1997).....                                                                                                                                                                                                                                                       | 23, 24 |
| Elisabeth Bumiller, <i>Beloved New Warriors on</i><br><i>the Modern Battlefield</i> , N.Y. Times, May 12,<br>2011.....                                                                                                                                                                                                                                                                                       | 18     |
| Stanley Coren, <i>How Dogs Think</i> (2004).....                                                                                                                                                                                                                                                                                                                                                             | 16     |
| Sir Arthur Conan Doyle, <i>The Sign of Four</i><br>(1890).....                                                                                                                                                                                                                                                                                                                                               | 17     |
| Florida Department of Law Enforcement, <i>Total</i><br><i>Arrests by County 2011</i> , <a href="http://www.fdle.state.fl.us/Content/FSAC/Menu/Data---Statistics-(1)/UCR-Arrest-Data.aspx">http://www.fdle.<br/>state.fl.us/Content/FSAC/Menu/Data---</a><br><a href="http://www.fdle.state.fl.us/Content/FSAC/Menu/Data---Statistics-(1)/UCR-Arrest-Data.aspx">Statistics-(1)/UCR-Arrest-Data.aspx</a> ..... | 35     |
| Kenneth G. Furton et al., <i>Identification of Odor</i><br><i>Signature Chemicals in Cocaine Using</i><br><i>Solid-Phase Microextraction-Gas</i><br><i>Chromatography and Detector-Dog</i><br><i>Response to Isolated Compounds Spiked on</i><br><i>U.S. Paper Currency</i> , 40 J.<br>Chromatographic Sci. 147 (2002) .....                                                                                 | 31     |

## TABLE OF AUTHORITIES—Continued

|                                                                                                                                                                                                                                                                                        | Page(s) |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| Kenneth G. Furton et al., <i>Scientific Working Group on Dog and Orthogonal Detector Guidelines</i> , Research Report for the U.S. Dep't of Justice (Sept. 2010) .....                                                                                                                 | 26      |
| Brian Handwerk, "Detector Dogs" Sniff Out Smugglers for U.S. Customs, National Geographic News, July 12, 2002, <a href="http://news.nationalgeographic.com/news/2002/07/0712_020712_drugdogs.html">http://news.nationalgeographic.com/news/2002/07/0712_020712_drugdogs.html</a> ..... | 34      |
| Homer, <i>The Odyssey</i> (W.H.D. Rouse trans. 1999) .....                                                                                                                                                                                                                             | 17      |
| Alexandra Horowitz, <i>Inside of a Dog: What Dogs See, Smell, and Know</i> (2009) .....                                                                                                                                                                                                | 16      |
| Orin Kerr, <i>Why Courts Should Not Quantify Probable Cause, in The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz</i> (Michael Klarman et al. ed. 2012) .....                                                                                           | 29      |
| 1 W. LaFave, <i>Search and Seizure</i> (2d ed. 1987 & Supp. 1995) .....                                                                                                                                                                                                                | 13      |
| Jennifer Lee, <i>Dogs and Discriminating Noses Are Following New Career Paths</i> , N.Y. Times, June 13, 2006 .....                                                                                                                                                                    | 36      |

## TABLE OF AUTHORITIES—Continued

|                                                                                                                                                                                                                                                                               | Page(s) |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| Mike Lee, <i>Detection Dogs Guard Against Pests<br/>in Agricultural Contraband</i> , San Diego<br>Union Trib., Aug. 30, 2010 .....                                                                                                                                            | 36      |
| Letter to James Read (Nov. 2, 1755) in<br><i>I Memoirs of Benjamin Franklin</i> (1840) .....                                                                                                                                                                                  | 18      |
| Richard E. Myers II, <i>Detector Dogs and<br/>Probable Cause</i> , 14 Geo. Mason. L. Rev. 1<br>(2006) .....                                                                                                                                                                   | 23      |
| Estelle Ross, <i>The Book of Noble Dogs</i> (1922) .....                                                                                                                                                                                                                      | 17      |
| <i>The Search-and-Rescue Dogs of 9/11</i> , N.Y.<br>Times Magazine, Aug. 11, 2011 .....                                                                                                                                                                                       | 19      |
| Stephanie Stoughton, <i>Tougher Screening<br/>Causes Few Hitches at Airports</i> , Boston<br>Globe, Jan. 19, 2002 .....                                                                                                                                                       | 18      |
| U.S. Customs and Border Protection, <i>Detector<br/>Dogs: CBP's "Secret Weapons,"</i> <a href="http://www.cbp.gov/xp/cgov/newsroom/highlights/border_se&lt;br/&gt;c_news/canines.xml">www.cbp.<br/>gov/xp/cgov/newsroom/highlights/border_se<br/>c_news/canines.xml</a> ..... | 19, 35  |

## OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 71 So. 3d 756, and is reprinted at Pet. App. A1-47. The opinion of the District Court of Appeal, First District, is reported at 989 So. 2d 1214, and is reprinted at Pet. App. A1-2. The trial court's oral ruling denying respondent's motion to suppress is not reported but is reprinted at JA 92.

## JURISDICTION

The Supreme Court of Florida issued a revised opinion on September 22, 2011. Pet. App. A3. On the same date, the Florida Supreme Court denied the State's motion for rehearing in an unpublished order. *Id.* at A53. On March 26, 2012, this Court granted the State of Florida's petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Although the Florida Supreme Court remanded the case for further proceedings, the court completely disposed of respondent's motion to suppress and, thus, finally decided the conclusive federal question presented. Pet. App. A48-49; *cf. Florida v. Thomas*, 532 U.S. 774, 777-80 (2001).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

### STATEMENT OF THE CASE

1. On the afternoon of June 24, 2006, Officer William Wheatley, a K-9 Officer with the Liberty County, Florida Sheriff's Office, was out on a routine patrol with his K-9 partner Aldo, a German Shepherd and trained narcotics-detection dog. Traveling east of Bristol, Florida on State Road 20, he came upon a pickup truck with an expired tag. After running the tag to confirm that it was expired, he pulled the truck over. JA 20, 61. The truck belonged to respondent Clayton Harris. It was not going to be his day.

Upon approaching the truck, Officer Wheatley noticed that respondent—the vehicle's sole occupant—was visibly nervous, shaking, and could not sit still. His chest was rapidly rising and falling. Officer Wheatley also saw an open can of Bud Light inside the truck's cab. Respondent acknowledged that his tag was expired, then denied Officer Wheatley's request to search the vehicle. Officer Wheatley returned to his patrol car to deploy Aldo. As he returned to the truck,



respondent was moving around in the cab of the truck and talking on his cell phone. Officer Wheatley led Aldo around the truck for a "free air sniff" of the exterior of the vehicle. Aldo alerted near the driver's side door handle—becoming excited then sitting, as he had been training to do over the course of hundreds of hours in K-9 instruction for certain narcotics, including methamphetamine (or meth). JA 20-22, 60, 62-63.

Officer Wheatley put Aldo back in his patrol car. Then he advised respondent that he had probable cause to search the vehicle, removed respondent from the truck, patted him down, and asked him if there was anything illegal in the truck. Respondent said that he was not aware of anything illegal in the truck, and Officer Wheatley proceeded to search the cab of the truck. Respondent turned out to be wrong. The search revealed various ingredients for a homemade batch of methamphetamine—the fruits of a shopping spree respondent had conducted over the past day or so at various retail outlets in Tallahassee. JA 21-22, 65.

Under the driver's seat, Officer Wheatley found 200 pseudoephedrine pills inside a plastic bag, the bulk of which respondent had purchased from three different Walgreens that day. Under the passenger seat, Officer Wheatley found a plastic bag with eight boxes containing 8,000 or so matches, which respondent had bought from a Publix that day. Officer Wheatley placed respondent under arrest for possession of listed chemicals (pseudoephedrine) and read him his *Miranda* rights. He then searched the passenger side toolbox of the truck bed and found a bottle of muriatic acid. A search of the driver side toolbox uncovered two bottles of antifreeze/water remover—acquired earlier that day from an Advance Auto Parts—and a Styrofoam plate



inside of a latex glove, and a coffee filter with iodine crystals. JA 21-22, 65-68.

After being *Mirandized*, respondent admitted to Officer Wheatley that he had been “cooking methamphetamine for about a year,” and that he could not go “more than a few days without using meth.” JA 68. Another officer—who had arrived at the scene just before the search—took respondent to the Liberty County’s Sheriff’s Office, and respondent’s truck was towed away and inventoried. JA 22, 45-46.

2. Respondent—who had a record of numerous prior drug offenses—was charged with unlawfully possessing pseudoephedrine, a listed chemical under Florida law because of its use in manufacturing methamphetamine. JA 13-14. He moved to suppress the evidence found during Officer Wheatley’s search of his pickup truck before his arrest on the ground that Officer Wheatley lacked probable cause to conduct the search, notwithstanding Aldo’s alert. JA 15-18.

At the suppression hearing, Officer Wheatley testified in detail about his own K-9 training as well as Aldo’s. He explained that—at the time of the search—he had been a canine handler for three years. He had completed a 160-hour narcotics-detection dog handling course with his previous canine partner through the Dothan, Alabama Police Department. JA 53. He had also attended an eight-hour course with Florida Department of Law Enforcement (FDLE) on the making of methamphetamine, where he learned about the chemicals and substances used to cook methamphetamine. JA 66-67.

After partnering with Aldo in July 2005—about a year before the search at issue—Officer Wheatley and

Aldo had both completed another 40-hour narcotics-detection training course. They have continued to attend that 40-hour refresher course every year. To ensure Aldo's proficiency in detecting narcotics, Officer Wheetley continually trained with Aldo for four hours every week on various drugs in different environments such as vehicles, buildings, and warehouses. Officer Wheetley explained that during training on vehicles they would choose multiple vehicles and hide narcotics in some while leaving others "blank" (*i.e.*, without contraband). He would bring Aldo by blank vehicles to test whether he would alert to vehicles without drugs. If there were eight vehicles with drugs on them, Aldo would alert to eight. JA 53–57, 59–60, 105.

Before being assigned to Officer Wheetley, Aldo had successfully completed a 120-hour narcotics-detection course with the Apopka, Florida Police Department, and was certified in 2004 to detect various narcotics—including methamphetamine—by Drug Beat K-9 Certifications, a private organization that has certified dogs for some 20 years. JA 102–104; *see* <http://www.drugbeat.com/> (last visited June 22, 2012).<sup>1</sup> Aldo is a passive alert dog trained to detect the odor of marijuana, methamphetamine, cocaine, heroin, crack cocaine, and ecstasy. He was not specifically trained to alert to the constituent ingredients of those drugs, such as pseudoephedrine. JA 77. When Aldo initially gets in the scent cone of the odor of those drugs, he exhibits specific passive behaviors. He takes a long sniff, his

---

<sup>1</sup> At the time of the search at issue, that certification—dated February 13, 2004—had expired. JA 103.

heart rate accelerates, and his feet begin to patter. Then he sits to complete the alert. JA 57-58.

Officer Wheetley described Aldo's performance in training as "really good." JA 60. Monthly training records bear that out. JA 106-116. Aldo's performance was "satisfactory"—on a scale of "satisfactory" or "unsatisfactory"—100% of the time from November 2005 to June 2006. *Id.* Although Officer Wheetley maintains records of arrests involving alerts by Aldo in the field (because he "keep[s] records of arrests"), he does not keep a record of instances where Aldo is deployed in the field and there is no arrest. JA 71-72, 74. Because field alerts—unlike training alerts—are not controlled events, it is not possible to ascertain the accuracy of such alerts when contraband is not found. In that situation, it is possible that the officer's search simply failed to uncover contraband that was hidden in the vehicle, or that the dog has alerted to the residual odor of contraband recently in the vehicle or on the presence of someone using the vehicle.

A few weeks after respondent's arrest on June 24, 2006, Officer Wheetley stopped respondent again while driving the same vehicle—this time for a malfunctioning brake light. Aldo again alerted to the same driver's side area of respondent's truck, and Officer Wheetley again searched the truck. This time, the search disclosed an open bottle of liquor but no drugs (or precursors for methamphetamine). JA 74-77.

The trial court held that there was probable cause to search the vehicle based on Aldo's alert and denied respondent's motion to suppress. JA 92. After entering a plea of *nolo contendere* that reserved his right to appeal the denial of his suppression motion, respondent was sentenced to 24 months in prison

followed by five years' probation. JA 93-96, 99, 131-32. The First District Court of Appeal affirmed the denial of respondent's motion to suppress. Pet. App. A1-2.

3. The Florida Supreme Court reversed. *Id.* at A48-49. That court held that evidence that a K-9 drug-detection dog has been trained and certified to detect narcotics, standing alone, is insufficient to establish the dog's reliability for purposes of establishing probable cause to search a vehicle, and that Officer Wheetley lacked probable cause to search the vehicle under the totality of the circumstances. In refusing to find that Aldo's alert to the vehicle established probable cause, the court attached significance to the fact that "there is no uniform standard in this state or nationwide for an acceptable level of training, testing, or certification for drug-detection dogs," *id.* at A29, and "the potential for false alerts, the potential for handler error, and the possibility of alerts to residual odors," *id.* at A30.

The Florida Supreme Court held that to demonstrate that a drug-detection dog's alert is sufficiently reliable to provide probable cause to search, the State must present: (1) evidence of the dog's training and certification records; (2) an explanation of the meaning of the particular training or certification; (3) field performance records (including any unverified alerts); (4) evidence concerning the experience and training of the officer handling the dog; and (5) any other objective evidence known to the officer about the dog's reliability. *Id.* at A48. Applying that standard, the court held that Aldo's alert failed to establish probable cause to search respondent's truck under the totality of the circumstances. *Id.* at A48-49.

Chief Justice Canady dissented. *Id.* at A49-52. He concluded that the court had imposed an unwarranted

evidentiary burden on the State, “based on a misconception of the federal constitutional requirement for probable cause.” *Id.* at A49. As he explained, “[t]he process of determining whether a search was reasonable because it is based on probable cause ‘does not deal with hard certainties, but with probabilities.’” *Id.* at A50 (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality)). In his view, the court’s decision contravened that central teaching because it establishes an evidentiary requirement that is tantamount to saying that police may “rely on drug detection dogs only when the dogs are shown to be virtually infallible.” *Id.* at A51. Chief Justice Canady further concluded that the State had presented ample evidence to conclude that “the searching officer had an objectively reasonable basis for crediting the dog’s alert” here, including evidence of Aldo’s extensive training and “success rate during training.” *Id.*

This Court granted certiorari.

### SUMMARY OF ARGUMENT

Officer Wheatley reasonably concluded that Aldo’s alert created a fair probability that respondent’s truck contained contraband or evidence of a crime. The Florida Supreme Court erred in concluding that Officer Wheatley nevertheless lacked probable cause to search the truck. The judgment of the Florida Supreme Court should be reversed, and this Court should hold that an alert by a well-trained drug-detection dog like Aldo establishes probable cause to search a vehicle.

It is well-settled that the Fourth Amendment permits an officer to search a vehicle if there is probable cause to believe that the vehicle contains contraband or evidence of a crime. And this Court has



repeatedly admonished that probable cause is a flexible, common-sense standard that considers whether the objective facts known to the officer at the time create “a fair probability” that contraband is present. People have known for centuries that dogs not only make special companions but possess an extraordinary sense of smell. This Court has repeatedly recognized the invaluable role played by drug-detection dogs in law enforcement at all levels, and lower courts have consistently held that alerts by drug-detection dogs established probable cause. This Court’s precedents compel the conclusion that a well-trained dog’s alert to the presence of contraband establishes “a fair probability” that a search will reveal contraband—and thus probable cause. And that conclusion is unassailable on the record here.

To support a finding of probable cause, it must of course be reasonable for a K-9 officer to believe that his dog’s alert is reliable. It is possible to establish reliability in any number of ways, and the Constitution does not impose any fixed requirement. But the fact that a drug-detection dog has been trained by canine professionals—and performed successfully in training—is sufficient to establish reliability, absent extraordinary circumstances showing otherwise. This Court has observed that a “well-trained narcotics-detection dog” alerts to the presence of drugs without “expos[ing] noncontraband items.” *Illinois v. Caballes*, 543 U.S. 405, 409 (2005). That is another way of saying that such a dog is reliable. And that is undoubtedly true for dogs that have successfully completed training programs, not to mention dogs—like Aldo—that are continuously trained. No one is in a better position to evaluate the reliability of a well-trained dog’s alert

than the trained K-9 officer who has spent countless hours training and working with that dog.

The Florida Supreme Court erred in imposing a rigid and undue evidentiary burden on law enforcement authorities to establish the reliability of drug-detection dogs. Its decision invites full-blown trials over all aspects of a dog's training, certification, or performance any time a defendant seeks to suppress evidence seized following an alert—which will be frequent if the Florida Supreme Court's laundry list of requirements is allowed to stand. In particular, there is no basis for the court's requirement for evidence of a dog's field performance. Indeed, field performance is inherently a less accurate indicator of reliability than performance in controlled training sessions—in which an alert, or non-alert, can be accurately identified, and the possibility that the officer simply missed contraband hidden in a vehicle or that the dog alerted to residual odors of illegal drugs can be ruled out.

The Florida Supreme Court also erred in requiring evidence to negate the possibility that a dog may alert to the residual odors of contraband that the dog is trained to detect. The possibility of residual odors always exists; yet trained detection dogs have long been reliably used as invaluable law enforcement partners in the field. The fact that a vehicle occupant (like respondent) is a walking drug lab as far as a dog's sense of smell is concerned hardly negates an officer's probable cause to search a vehicle when a dog alerts to it. Nor do individuals have a reasonable expectation of privacy in the residual odors of illegal contraband or activity once they hit the streets. Moreover, the lawfulness of a search is determined based on what the officer knows *ex ante* (i.e., the fact of the dog's alert)—



not on a *post hoc* assessment whether a dog in fact alerted to a residual odor of contraband.

If adopted by this Court, the Florida Supreme Court's understanding of what the Fourth Amendment requires in this vitally important law enforcement context would impose an inordinate evidentiary burden on law enforcement authorities at the state, local, and federal level across the country, exact major social costs, and destabilize a settled area of law. There is no reason for the Court to take that step.

### ARGUMENT

#### **THE FLORIDA SUPREME COURT ERRED IN HOLDING THAT AN ALERT BY A WELL-TRAINED DRUG-DETECTION DOG FAILS TO ESTABLISH PROBABLE CAUSE**

##### **A. Probable Cause Is A Flexible, Common-Sense Standard That Depends On Fair Probabilities And Not Hard Certainties**

The Fourth Amendment to the Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause." This Court has long recognized that due to the "ready mobility" of motor vehicles and diminished expectation of privacy resulting from the "pervasive regulation of vehicles capable of traveling on the public highways," probable cause suffices to justify the search of a vehicle even in the absence of a warrant. *California v. Carney*, 471 U.S. 386, 391-92 (1985); *see also, e.g., Wyoming v. Houghton*, 526 U.S. 295, 300 (1999); *Carroll v. United States*, 267 U.S. 132, 153 (1925).

The constitutional requirement of probable cause “protects ‘citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,’ while giving ‘fair leeway for enforcing the law in the community’s protection.’” *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). This Court has struck this balance by holding that probable cause is “a flexible, common-sense standard” that “merely requires that the facts available to the officer would ‘warrant a man of reasonable caution in the belief’” that contraband or evidence of a crime is present. *Brown*, 460 U.S. at 742 (quoting *Carroll*, 267 U.S. at 162).

That standard is not based on “hard certainties, but [on] probabilities.” *Id.* Law enforcement officers need not establish their belief that a vehicle contains contraband is “more likely true than false.” *Id.*; see also *Pringle*, 540 U.S. at 371 (“‘Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable cause] decision.’”) (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983)). Probable cause is not a mathematical concept. And no specific probability is necessary to establish probable cause. As this Court has held, all that is required is “a fair probability,” *Gates*, 462 U.S. at 246, or a “substantial chance,” *id.* at 244 n.13, that a search will reveal contraband. See also *id.* at 235 (rejecting “an effort to fix some general, numerically precise degree of certainty corresponding to ‘probable cause’”); *Pringle*, 540 U.S. at 371 (“The probable-cause standard is incapable of precise definition or quantification into percentages . . .”).

Probable cause is an objective inquiry based on what is known to the officer on the spot. The inquiry “depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the [search].” *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). Whether the search turns up the contraband the officer expected is irrelevant, because “[i]t is axiomatic that hindsight may not be employed in determining whether a prior arrest or search was made upon probable cause.” *Arizona v. Evans*, 514 U.S. 1, 17 (1995) (O’Connor, J., concurring) (quoting 1 W. LaFare, *Search and Seizure* § 3.2(d) (2d ed. 1987 & Supp. 1995)); cf. *Hill v. California*, 401 U.S. 797, 804–05 (1971) (no Fourth Amendment violation by search subsequent to arrest when police have probable cause to arrest suspect, but arrest the wrong person). Probable cause, in other words, is based on an objective, *ex ante* assessment of the situation that the officer faces before deciding to search, not a Monday morning quarterback’s view of what the officer should have done with the benefit with hindsight.

The determination whether there is a “fair probability” or “substantial chance” of finding evidence of a crime is based on the totality of the circumstances. *Gates*, 462 U.S. at 238, 244 n.13; see also *Pringle*, 540 U.S. at 371. Probable cause accordingly cannot be “readily, or even usefully, reduced to a neat set of legal rules.” *Gates*, 462 U.S. at 232. This Court has repeatedly rejected attempts to mechanize the probable cause inquiry by substituting rigid tests for “the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations.” *Id.* at 238. Instead, the totality-of-the-circumstances analysis looks to all relevant factors

known to the officer, including the on-the-spot judgments that officers must make in the field based on their experience and instincts. Accordingly, this Court's cases "have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists." *Ornelas v. United States*, 517 U.S. 690, 700 (1996).

The reliability of information on which an officer bases the decision to search naturally is an important consideration in totality-of-the-circumstances analysis. But because probable cause does not depend on any logical or statistical guarantee that contraband will be found, this Court has recognized that there is a difference between reliability and infallibility. In the context of tips gathered from human informants, the Court has held that information is reliable when it turns on "common-sense conclusions about human behavior," *Brown*, 460 U.S. at 742, and rejected the notion that informants must be "infallible," *Gates*, 462 U.S. at 246 n.14 ("We have never required that informants used by the police be infallible . . ."). Those common-sense conclusions do not require scientific validation or lengthy track records, so long as they are grounded in a "practical, nontechnical' probability that incriminating evidence is involved." *Brown*, 460 U.S. at 742 (quoting *Brinegar*, 338 U.S. at 176).

Given the flexibility that the Fourth Amendment demands, the Court has looked to various "indicia of reliability" to determine whether a source can provide probable cause. *Gates*, 462 U.S. at 233. For informants lacking inherent trustworthiness, stronger evidence of reliability may be necessary. See, e.g., *McCray v. Illinois*, 386 U.S. 300 (1967) (informant's track record of accurate information supports probable cause);

*United States v. Harris*, 403 U.S. 573 (1971) (statements against penal interest support probable cause). Or officers may need to corroborate untrustworthy information first. *See, e.g., Draper v. United States*, 358 U.S. 307 (1959). By contrast, information from those without a motivation to deceive police can support probable cause all by itself. *See, e.g., Gates*, 462 U.S. at 233 (an “unquestionably honest citizen [who] comes forward with a report of criminal activity” supports probable cause). And information provided by other members of law enforcement based on personal knowledge is invariably reliable by its nature. *See, e.g., United States v. Ventresca*, 380 U.S. 102, 111 (1965) (“Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis” for probable cause).

These principles—hardened by decades’ worth of precedent from both this Court and lower courts applying this Court’s precedent—provide the analytical framework for resolving the question presented. Ultimately, they compel the conclusion that the Florida Supreme Court erred in erecting a rigid and far-reaching evidentiary requirement for proving the reliability of drug-detection dogs, and in holding that an alert by a well-trained drug-detection dog is insufficient to establish probable cause.

#### **B. An Alert By A Well-Trained Drug-Detection Dog Establishes Probable Cause To Search**

As Judge Gorsuch has observed, it “goes without saying that a drug dog’s alert establishes probable cause only if that dog is reliable.” *United States v. Ludwig*, 641 F.3d 1243, 1251 (10th Cir. 2011). The



overriding question in this case is what evidence is necessary or sufficient to establish the reliability of a drug-detection dog's alert. A K-9 dog's reliability may be established in any number of ways. But evidence that a drug-detection dog is well-trained is itself sufficient to demonstrate reliability for purposes of establishing probable cause based on the dog's alert.

***1. For Millennia, It Has Been Known That Dogs Have A Superior Sense Of Smell***

There is a reason that law enforcement has turned to dogs to assist it in uncovering illegal contraband. Scientists estimate the olfactory prowess of canines to exceed that of humans by a factor of one to ten thousand. Stanley Coren, *How Dogs Think* 51 (2004). Dogs' noses are anatomically crafted to detect scents at extraordinarily low concentrations. Within the nasal cavity, dogs possess hundreds of millions of sensory receptor cells, dwarfing the six million in a human nose. Alexandra Horowitz, *Inside of a Dog: What Dogs See, Smell, and Know* 71 (2009). After scents are trapped and detected, the receptor cells transmit signals to the olfactory "bulb," the part of a dog's brain devoted to smell that occupies a staggering twenty percent of the dog's total brain mass. *Id.* The proportion of a dog's brain dedicated to olfaction is some forty times that of the human brain. Coren, *supra*, at 51.

Although the science confirming dogs' superior sense of smell has become more developed over time, the fact of that superiority has been recognized as long as dogs have been man's best friend. For millennia, dogs' superior sense of smell has been an recognized as an invaluable asset in the canine-human partnership. Dogs like Odysseus's faithful hound Argos were valued

in ancient times for their ability to track game. Homer, *The Odyssey* 197 (W.H.D. Rouse trans. 1999) ("Never a beast could escape him in the deep forest when he was on the track, for he was a prime tracker."). Reports of dogs being used to recall and track human scents for law enforcement purposes date back at least to the classical era, with the earliest known report of a dog recognizing his master's murderers recorded in the third century B.C. Estelle Ross, *The Book of Noble Dogs* 34 (1922). The value of the canine "power of scent" for law enforcement was so well-known in the 1800s that in *The Sign of Four* (1890), Sir Arthur Conan Doyle paired Sherlock Holmes with a dog, Toby, to track a villain, and had the great detective remark that he "would rather have Toby's help than that of the whole detective force of London." *Id.* at 98, 109. See also *Blair v. Kentucky*, 204 S.W. 67 (Ky. 1918) (discussing longstanding use of bloodhound evidence).<sup>2</sup>

---

<sup>2</sup> The *Blair* court recounted the following scene from the Sir Walter Scott novel *The Talisman*, which involved the joint crusade of Richard I of England and Phillip II of France. When a hound pulled the Marquis of Montserrat from the saddle—"thus mutely accusing him of the theft of the banner of England"—Phillip came to the Marquis' defense saying, "Surely the word of a knight and a prince should bear him out against the barking of a cur." 204 S.W. at 68. To which Richard replied:

"Royal brother, recollect that the Almighty, who gave the dog to be companion of our pleasures and our toils, both invested him with a nature noble and incapable of deceit. He forgets neither friend nor foe—remembers, and with accuracy, both benefit and injury. He has a share of man's intelligence, but no share of man's falsehood. You may bribe a soldier to slay a man with his sword, or a witness to take life by false accusation; but you cannot make a hound tear his benefactor; he is the friend of man save when man justly incurs his enmity. Dress yonder



Dogs' superior sense of smell have advanced military needs as well, something that did not escape the attention of our nation's founders. During the French and Indian Wars, colonists around Boston were harried by elusive marauders. Benjamin Franklin suggested a clever response: arming search parties with dogs, and when "the Party come near thick Woods and suspicious Places, they should turn out a Dog or two to search them." Letter to James Read (Nov. 2, 1755) in *I Memoirs of Benjamin Franklin* xviii (1840). Contemporary dogs accompany our armed forces overseas not only for tracking, but to detect the improvised explosives that have become a ubiquitous threat to American troops. One canine even accompanied Navy SEAL Team 6 on the mission that successfully killed Osama Bin Laden. Elisabeth Bumiller, *Beloved New Warriors on the Modern Battlefield*, N.Y. Times, May 12, 2011, at A12.

In this country—and the world over—trained detection dogs are entrusted with missions of the utmost sensitivity and consequence. Among other things, dogs are trained to search for explosives that remain an ever-present threat in airports. Stephanie Stoughton, *Tougher Screening Causes Few Hitches at Airports*, Boston Globe, Jan. 19, 2002, at A1. They investigate deadly fires and help put those responsible

---

marquis in what peacock robes you will, disguise his appearance, alter his complexion with drugs and washes, hide himself amidst a hundred men; I will yet pawn my scepter that the hound detects him, and expresses his resentment, as you have this day beheld."

*Id.* Although a fictional account, it nevertheless says a great about how the capabilities of dogs have been viewed for centuries.

behind bars. Jessica Anderson, *Four-Footed Arson Detectives Work Across the State*, Balt. Sun, Dec. 27, 2010, at 2A. Dogs also lead the search for survivors and the departed in the wake of tragic events or atrocities. *The Search-and-Rescue Dogs of 9/11*, N.Y. Times Magazine, Aug. 11, 2011, at 50.

And thousands of trained K-9 dogs—like Aldo—are used to carry out critically important law enforcement tasks, including drug detection, by officers at the state, local, and federal level across America every day. These dogs—like their human handlers—are not infallible. But the use of trained dogs for law enforcement purposes has been a remarkable success story. Indeed, the fact that drug-detection dogs have become such an ingrained part of law enforcement across the country—and around the world—speaks volumes about how well they have performed. See, e.g., U.S. Customs and Border Patrol, *Detector Dogs: CBP's "Secret Weapons,"* [www.cbp.gov/xp/cgov/newsroom/highlights/border\\_sec\\_news/canines.xml](http://www.cbp.gov/xp/cgov/newsroom/highlights/border_sec_news/canines.xml) (last visited June 22, 2012) (“They may not make the news, but everyone on the frontlines know the value of a well-meshed team of dog and handler. The bad guys fear them and the good guys praise them . . .”).

***2. An Alert By A Well-Trained Drug-Detection Dog Creates At Least A Fair Probability That Contraband Exists***

Even the human nose—with its comparatively scant 6 million receptor cells—can sometimes detect the smell of drugs wafting from a vehicle. And where an officer believes that he has smelled drugs, this Court has unsurprisingly recognized that there is likely probable cause to search the vehicle from which the

smell emanates. In *United States v. Johns*, officers observed two trucks that were being surveilled parked next to a small aircraft. 469 U.S. 478, 480 (1985). “After the officers came closer and detected the distinct odor of marihuana,” this Court held, “they had probable cause to believe that the vehicles contained contraband.” *Id.* at 482; see also *Ventresca*, 380 U.S. at 111 (noting a “qualified officer’s detection of the smell of mash has often been held a very strong factor in determining that probable cause exists”).

So it is not at all surprising that this Court has recognized that the alert of an officer’s well-trained canine partner can also establish probable cause to search. In *Florida v. Royer*, a plurality noted that “[t]he courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage.” 460 U.S. 491, 505–06 (1983). A trained dog was not used to sniff the luggage search in that case. But significantly, the Court observed that—had the officers employed such a dog—“a positive result would have resulted in his justifiable arrest on probable cause.” *Id.* at 506. The Court again recognized the common practice of using drug-detection dogs in *United States v. Place*, 462 U.S. 696, 707 (1983), and *Illinois v. Caballes*, 543 U.S. at 409–10, where the Court held that a “canine sniff” by a well-trained narcotics-detection dog” is not a search.

Although the Court’s holdings in those cases do not directly address the question presented by this case, the rationale and results in *Royer*, *Place*, and *Caballes* lend strong support to the conclusion that an alert by a well-trained drug-detection gives rise to probable cause to search a vehicle. The force of those decisions—which have been relied upon by law

enforcement officers for decades (at least in the case of *Royer* and *Place*)—would be significantly eroded if an alert did not then give rise to probable cause to conduct a search. Indeed, following this Court’s lead, lower courts have widely recognized that a well-trained dog’s alert established probable cause to search.<sup>3</sup>

---

<sup>3</sup> See, e.g., *United States v. Robinson*, 707 F.2d 811, 815 (4th Cir. 1983) (“The detection of narcotics by a trained dog is generally sufficient to establish probable cause.”); *United States v. Daniel*, 982 F.2d 146, 151 & 152 n.7 (5th Cir. 1993) (finding probable cause where affidavit “explained that the dog was trained to detect the presence of controlled substances” and rejecting requirement that affidavit “show how reliable a drug-detecting dog has been in the past”); *United States v. Olivera-Mendez*, 484 F.3d 505, 512 (8th Cir. 2007) (“We have held that to establish a dog’s reliability . . . the affidavit need only state the dog has been trained and certified to detect drugs, and a detailed account of the dog’s track record or education is unnecessary.”); *United States v. Kennedy*, 131 F.3d 1371, 1376–77 (10th Cir. 1997) (“As a general rule, a search warrant based on a narcotics canine alert will be sufficient on its face if the affidavit states that the dog is trained and certified to detect narcotics.”); *United States v. Sentovich*, 677 F.2d 834, 838 n.8 (11th Cir. 1982) (“[O]ther circuits have held that training of a dog alone is sufficient proof of reliability. We endorse the views of those circuits.”) (citing *United States v. Venema*, 563 F.2d 1003, 1005 (10th Cir. 1977) and *United States v. Meyer*, 536 F.2d 963, 965–66 (1st Cir. 1976)); *Maryland v. Wallace*, 812 A.2d 291, 297 (Md. 2002) (“[T]he law is settled that when a properly trained canine alerts to a vehicle indicating the likelihood of contraband, sufficient probable cause exists to conduct a warrantless ‘Carroll’ search of the vehicle.”) (unless otherwise noted, all citations and internal quotation marks omitted); see also *Oregon v. Foster*, 252 P.3d 292, 298 n.4 (Ore. 2011) (observing that the cases recognizing that a well-trained dog’s alert may establish probable cause “are too numerous for citation”).

This Court previously has referred to a “well-trained narcotics-detection dog” as one that can alert to the presence of drugs without “expos[ing] noncontraband items that otherwise would remain hidden from public view.” *Caballes*, 543 U.S. at 409 (quoting *Place*, 462 U.S. at 707). In other words, a well-trained dog is reliable. That makes sense. A canine Barney Fife that regularly fails to detect contraband—or routinely alerts when contraband is absent—will be quickly identified during any genuine training regime and ferreted out. A dog’s successful completion of a narcotics-detection training program conducted by canine professionals—whether private or formally part of law enforcement—is therefore a strong “ind[ex] of reliability.” *Gates*, 462 U.S. at 233.

Although training alone is sufficient to establish a dog’s reliability, reliability may be demonstrated in any number of other ways as well. For example, the fact that a dog has been certified by a narcotics-detection training organization also demonstrates reliability. See *Ludwig*, 641 F.3d at 1250–51. And even if a dog has not been certified or trained as part of a standardized program, the dog’s performance in a less formal exercises or events may demonstrate reliability too. See *id.* at 1251 n.3. When an officer knows that a drug-detection dog has been trained or certified, or has otherwise exhibited reliable performance in detecting contraband, he may reasonably conclude that the dog’s alert creates at least a “fair probability” that a vehicle contains illegal drugs. *Gates*, 462 U.S. at 238.

A dog’s K-9 handler—who often will have spent scores or hundreds of hours with the dog in training or certification, in addition to time spent together in the field—is in the best position to evaluate the dog’s



reliability, both as a general matter and in the particular circumstances at hand. K-9 officers like Officer Wheatley are themselves trained to interpret their dog's behavior. Moreover, every K-9 officer has a strong incentive to ensure that his dog is well-trained—and thus reliable. False alerts will only waste an officer's time and, worse, put him at risk in the field. Searching a vehicle that has been stopped on a roadside is one of the most dangerous encounters police routinely face. *Cf. Michigan v. Long*, 463 U.S. 1032, 1047 (1983) (observing that “investigative detentions involving suspects in vehicles are especially fraught with danger to police officers”). Officers are not going to want to be put at risk by a dog that is unreliable. At the same time, no officer would want to rely on a dog that serially fails to detect contraband. Law enforcement interests, in other words, are naturally aligned with the interests of ensuring reliability.<sup>4</sup>

---

<sup>4</sup> The Florida Supreme Court, relying largely on law review commentary, speculated that handler error (including cuing) could cast doubt on the reliability of a well-trained dog's alerts. Pet. App. A31–32, A40–41 (citing Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason. L. Rev. 1 (2006) and Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405 (1997)). That speculation ignores that a well-trained dog by definition would be trained to alert to the presence of contraband, not the handler's expectation of contraband, and that K-9 officers are themselves trained not to cue dogs. And the Florida Supreme Court's reliance on those articles here was especially misplaced. First, respondent never argued that Officer Wheatley cued Aldo to alert to respondent's truck. JA 15–18. And second, one of the articles cited by the Florida Supreme Court itself recognizes that handler training—including a “formal training course” like the extensive 160- and

Although the State has the burden to establish probable cause, that showing will be met when the State introduces evidence that the dog was trained, or has been certified or otherwise has shown proficiency in detecting narcotics. The canine professionals—including K-9 officers—that train or certify dogs are in a far better position than the courts to determine the legitimacy of such training or certification. If a training or credentialing organization proved to be a “sham,” then the fact of training or certification no longer would “serve as proof of reliability.” *Ludwig*, 641 F.3d at 1251. But in the absence of extraordinary circumstances, the fact that a dog has successfully completed a training program—or has been certified or otherwise has demonstrated reliability in detecting drugs—“would warrant a man of reasonable caution in the belief” that drugs will be found in a vehicle when the dog has alerted to that vehicle. *Brown*, 460 U.S. at 742 (quoting *Carroll*, 267 U.S. at 162); cf. *Ludwig*, 641 F.3d at 1251 (holding that “the judicial task” is “limited . . . to assessing the reliability of the credentialing organization, not individual dogs”).<sup>5</sup>

---

annual 40-hour sessions Officer Wheatley completed (JA 53–55)—addresses this concern. See *Bird*, *supra*, at 424–25.

<sup>5</sup> Although an alert by a well-trained dog without more gives rise to probable cause, other circumstances known to the officer may negate probable cause, such as when a dog is injured or unable to perform as trained due to external factors.



**C. None Of The Factors Relied Upon By The  
Florida Supreme Court Warrant Any  
Different Rule**

The Florida Supreme Court held that a dog's completion of a training or certification program did not justify an officer's reliance on an alert, even when, as here, the State has produced evidence that the dog was well-trained. Pet. App. A40-41. Instead, the Florida Supreme Court held that the State is not only required to introduce detailed evidence of the dog's training and certification, but evidence of the dog's performance in the field. *See id.* at A42, 44. In addition, the court further held that the State is required to introduce evidence of the dog's alerts to residual odors on the theory that the risk of residual odor alerts negates probable cause. *Id.* at A33-34. The upshot is that the Florida Supreme Court's decision requires a mini-trial over all details of a dog's training, certification, and performance in any case in which the defendant decides to challenge probable cause—which will be many if its decision is affirmed. The specific factors that the Florida Supreme Court singled out as supporting this approach are unfounded.

***1. Records Of A Well-Trained Dog's Field  
Performance Are Not Required***

Field performance records are not necessary to establish that a well-trained dog's alert provided probable cause. For starters, the training records of the dog's alerts in the controlled training environment will more accurately reflect the dog's reliability, as will records establishing the dog and handler successfully completed a certification regime for particular narcotics. Field activity reports are by no means the

full measure—nor even the most meaningful gauge—of a dog's reliability. Unlike training, in the uncontrolled field environment it is impossible to tell whether an alert that does not result in an officer's recovery of drugs is a true "false" positive. For example, the dog may have detected the presence of drugs that the officer is simply unable to locate in a vehicle because of the amount of drugs or ingenuity of the suspect in hiding them. Or the dog may have alerted to the residual odor of contraband, which generally indicates that drugs were recently in that location.

Training and certification settings can replicate field conditions but can control for the latter types of alerts, which makes their results inherently more reliable than field records. See *South Dakota v. Nguyen*, 726 N.W.2d 871, 878 (S.D. 2007) ("With the training being conducted in controlled circumstances, a dog's ability to find and signal the presence of drugs can be accurately measured. In the field, one simply cannot know whether the dog picked up the odor of an old drug scent or whether it mistakenly indicated where there was no drug scent."); see also Kenneth G. Furton et al., *Scientific Working Group on Dog and Orthogonal Detector Guidelines* 51, Research Report for the U.S. Dep't of Justice (Sept. 2010) ("In a certification procedure you will know whether you have a false positive. You cannot know whether you have a false positive in most operational situations.").

The requirement of detailed field performance records depends not only on faulty factual assumptions about the probative value of such evidence, but on a flawed legal theory as well. The Florida Supreme Court invoked an analogy between narcotics-detection dogs and anonymous police informants, and suggested

that evidence of a track record of success is necessary to establish the reliability of each. *See* Pet. App. A26–28, 37–38. To be sure, prior success is one way to bolster the credibility of an anonymous informant. *See, e.g., Gates*, 462 U.S. at 233; *Florida v. J.L.*, 529 U.S. 266, 275 (2000) (Kennedy, J., concurring). But a track record certainly is not the only way to establish reliability. *See, e.g., Alabama v. White*, 496 U.S. 325, 331 (1990) (partially corroborated statements are reliable); *Draper v. United States*, 358 U.S. 307, 313 (1959) (statements with highly detailed information are reliable). And the Court has rejected the idea that probable cause depends on information that satisfies rigid necessary conditions for reliability. *See Gates*, 462 U.S. at 230 (rejecting “separate and independent requirements to be rigidly exacted in every case”).

More important, well-trained dogs are entirely unlike anonymous informants. Indeed, they lack the trait that arguably makes informant tips susceptible to manipulation—an incentive to lie or twist the truth for ulterior objectives. *See, e.g., Maryland v. Cabral*, 859 A.2d 285, 300 (Md. Ct. Spec. App. 2004) (“The personal and financial reasons and interest typically behind an informant’s decision to cooperate can hardly be equated with what drives a canine to perform for its trainer.”) (quotation omitted). An anonymous tipster’s hidden motivation or perceived immunity from punishment make him a less trustworthy character. Furthermore, a court usually cannot assess the basis of an informant’s knowledge, or motive to lie, with certainty. This Court has recognized that these flaws in turn require some additional “indicia of reliability” before an anonymous tip will create probable cause. *Gates*, 462 U.S. at 233.

By contrast, this Court has recognized that “an unquestionably honest citizen [who] comes forward with a report of criminal activity” presents no such problems, and that “rigorous scrutiny” is unnecessary even without a track record of successful tips. *Gates*, 463 U.S. at 233. Likewise, the Court has held that law enforcement officers are presumptively reliable. See *Ventresca*, 380 U.S. at 111 (“Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number.”). A well-trained dog is analogous to an “unquestionably honest citizen” and law enforcement informant in both respects. A dog prosecutes no secret vendettas or hidden rivalries, and is indeed a trained member of the police force. See, e.g., *United States v. Funds in the Amount of \$242,484*, 389 F.3d 1149, 1165 (11th Cir. 2004) (describing a narcotics-detection dog as “a highly trained and credentialed professional whose integrity and objectivity are beyond reproach”). Accordingly, this Court’s informant cases in no way support the sort of scrutiny that the Florida Supreme Court has demanded concerning a well-trained dog’s track record of success. See *United States v. Kitchell*, 653 F.3d 1206, 1223 (10th Cir. 2011) (“[A] dog alert usually is at least as reliable as many other sources of probable cause and is certainly reliable enough to create a ‘fair probability’ that there is contraband.”) (quotation omitted).

Moreover, the Florida Supreme Court’s requirement of demonstrating a dog’s past performance in the field is simply another way of attempting to create a quantified measure of probable cause. See Pet. App. A42–43 n.12 (“Because the State did not introduce Aldo’s field performance records, this

Court does not have the benefit of quantifying Aldo's success rate in the field."). Such an approach would substitute the flexible totality-of-the-circumstances analysis with a mechanical comparison of the dog's success rate based on a "one-size-fits-all mathematical equation." *Ludwig*, 641 F.3d at 1251; see also Orin Kerr, *Why Courts Should Not Quantify Probable Cause*, in *The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz* 143 (Michael Klarman et al. ed. 2012) ("If probable cause were quantified, cognitive biases would make the numbers . . . seem far more important than they are."). But this Court has squarely rejected that mathematical approach. See *Pringle*, 540 U.S. at 371 ("The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances."). That approach should be rejected.

## ***2. The Possibility Of Alerts To Residual Odors Does Not Negate Probable Cause***

The Florida Supreme Court also demanded an inquiry into whether the dog has previously alerted to "residual odor, which may not indicate the presence of drugs in the vehicle at the time of the sniff." Pet. App. A32. But the possibility that a well-trained dog may alert to residual odors cannot defeat probable cause.

Probable cause does not demand a 100% correlation between alerts and the presence of seizable quantities of drugs or evidence of a crime of drug use. It "does not deal with hard certainties, but with probabilities." *Brown*, 460 U.S. at 742. The standard does not even demand that the belief that there are drugs present be "more likely true than false." *Id.* This Court has



already recognized that narcotics-detection dogs are extremely effective in their trained role. *See Caballes*, 543 U.S. at 409; *Place*, 462 U.S. at 707. Even if it is possible that trained dogs will alert to residual odors, “the likelihood that the dog’s alert indicates the presence of an illegal drug remains a substantial one.” *Foster*, 252 P.3d at 299; cf. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (the fact that conduct may be “ambiguous and susceptible of an innocent explanation” does not defeat reasonable suspicion).

Nor does the presence of residual odors of contraband imply innocence. As the Oregon Supreme Court has observed, “even when actual drugs are not present, something that carries the odor of the drug (such as drug paraphernalia, a receipt for drug sales, or another item associated with drug use or drug distribution) likely is present and may be seizable, even if it is not the drug itself.” *Foster*, 252 P.3d at 299–300; see also *United States v. Boxley*, 373 F.3d 759, 761 (6th Cir. 2004) (a well-trained dog alert “indicates that narcotics are present in the item being sniffed or have been present in such a way as to leave a detectable odor”). When officers recover seizable evidence other than the drugs themselves, it can hardly be maintained that the alert was a false positive. In this case, Aldo may well have alerted to the residual odors of methamphetamine that respondent himself produced, since respondent—who admitted to both cooking methamphetamine and using it every “few days,” JA 68—was a traveling meth lab as far as his scent was concerned. Aldo’s alert to the presence of such odors can hardly be viewed as a “false” positive. The possibility that dogs will alert to vehicles driven by those involved in the heavy use, manufacture, or

distribution of drugs provides no basis for ratcheting up the standard for probable cause.

Further, the Florida Supreme Court's premise that more evidence is needed because of the possibility of "false" alerts due to residual odors is at odds with the universally accepted law enforcement practice of using trained drug-detection dogs. *See, e.g., Bond v. United States*, 529 U.S. 334, 341 (2000) (Breyer, J., dissenting) (noting "the accepted police practice of using dogs to sniff for drugs hidden inside luggage"). The possibility that a dog could alert to a residual odor always exists in theory, and can never truly be eliminated. Yet, drug-detection dogs have been certified, trained, and reliably used by law enforcement for decades.

In the end, the Florida Supreme Court's demand for evidence negating the possibility of an alert to residual odors rather than contraband stems from its mistaken belief that probable cause requires a mathematical certainty rather than fair probability of contraband.<sup>6</sup>

---

<sup>6</sup> Some have speculated that, because a large percentage of U.S. currency reportedly has come into contact with cocaine at one time or another, residual odors emanating from currency may trigger false alerts. That theory, however, has been debunked "by studies showing that the particular chemical from cocaine that dogs detect does not remain in currency for an extended time under normal circumstances." *Foster*, 252 P.3d at 300 n.8 (citing, *e.g., United States v. Funds in the Amount of \$30,670*, 403 F.3d 448, 461 (7th Cir. 2005) (explaining that "rigorous empirical testing" supports the conclusion that "it is likely that trained cocaine detection dogs will alert to currency only if it has been exposed to large amounts of illicit cocaine within the very recent past") (citing studies); *see also* Kenneth G. Furton et al., *Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction-Gas Chromatography and Detector-*



### 3. *The Absence Of Uniform Standards For Training Or Certification Provides No Reason To Require Courts To Conduct Mini-Trials On Dog Training*

As the Florida Supreme Court noted, “there is no uniform standard in this state or nationwide for an acceptable level of training, testing, or certification for drug-detection dogs.” Pet. App. A29. Given the absence of a uniform standard, the court reasoned that “the State must explain the training and certification so that *the trial court* can evaluate how well the dog is trained.” *Id.* at A39 (emphasis added). That was error. As the Tenth Circuit has observed, “canine professionals are better equipped than judges to say whether an individual dog is up to snuff.” *Ludwig*, 641 F.3d at 1251. Both public and private training and certification organizations staff experienced dog trainers who are familiar with the detection abilities of dogs and the needs of law enforcement. The Fourth Amendment does not require the adoption of a uniform set of training or certification standards. Nor does it saddle the courts with the task of superintending the professionals who train, certify, or handle dogs for a living. Accordingly, evidence that a dog has been trained or certified by canine professionals should be deemed conclusive—rather than merely a target for

---

*Dog Response to Isolated Compounds Spiked on U.S. Paper Currency*, 40 J. Chromatographic Sci. 147, 155 (2002) (“[I]t is not plausible that innocently contaminated U.S. currency contains sufficient enough quantities of cocaine and associated volatile chemicals to signal an alert from a properly trained drug detector dog.”).

defendants to shoot at under the type of judicial inquiry conceived by the Florida Supreme Court.<sup>7</sup>

**D. The Florida Supreme Court's Rigid And Burdensome Rule Would Impose Substantial and Unjustifiable Costs**

As Chief Justice Canady recognized, the rule adopted by the Florida Supreme Court places an undue evidentiary burden on the State. Pet. App. A49. Probable cause requires only that a vehicle search be justified by "reasonably trustworthy information." *Brinegar*, 338 U.S. at 175 (quoting *Carroll*, 267 U.S. at 162). The Florida Supreme Court disregarded that teaching and demanded a litany of documentation far in excess of what is necessary to make a well-trained dog's alert "reasonably trustworthy." See Part C, *supra*. As the dissent recognized below, that demand "imposes evidentiary requirements which can readily be employed to ensure that the police rely on drug detection dogs only when the dogs are shown to be virtually infallible." Pet. App. A51. Not only is the Florida Supreme Court's multi-faceted evidentiary test for establishing reliability legally unsound, it would impose substantial and unjustifiable costs on important societal and law enforcement interests.

---

<sup>7</sup> Training and certification organizations are generally affiliated or at least familiar with the needs of law enforcement. There is accordingly no reason to think that such organization would not provide appropriate service for narcotics-detection dogs. In the unlikely event that a "sham organization" trained or certified a dog, such training or certification, alone, would not constitute sufficient evidence of reliability. See *Ludwig*, 641 F.3d at 1251.

Adopting the Florida Supreme Court's rule would upend settled law across the nation. Law enforcement officers in the numerous jurisdictions that have recognized that a well-trained dog's alert is sufficient may have reasonably relied on existing law by choosing not to craft the sort of novel, sniff-by-sniff records demanded by the Florida Supreme Court. And going forward, the task of compiling and maintaining such records would be an arduous given the existing demands of canine units, and invites any defendant to put trained drug-detection dogs—and their handlers—on trial every time an alert leads to the discovery of evidence that a defendant wishes to suppress. *See* Part C.1, *supra*; *see also Colorado v. Unruh*, 713 P.2d 370, 382 (Colo. 1986) (“Requiring a formal recitation of a police dog's *curriculum vitae* could lead to endless challenges to the facial sufficiency of affidavits based on the failure to include in minute detail information of dubious value about the background of the dog involved.”) (quotation omitted). There is no reason to subject already over-burdened law enforcement officials to such impractical demands.

Needless to say, the loss of crucial tangible evidence found by well-trained narcotics-detection dogs also would have “substantial social costs.” *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (quoting *United States v. Leon*, 468 U.S. 897, 906 (1984)). These dogs are critically important to the nationwide efforts to identify and prosecute drug criminals. Among other things, drug-detection dogs “annually keep billions of U.S. dollars (street value) worth of drugs off the streets,” and in 2001 their work resulted in nearly 8,000 arrests. Brian Handwerk, “Detector Dogs” Sniff Out Smugglers for U.S. Customs, National Geographic

News, July 12, 2002, [http://news.nationalgeographic.com/news/2002/07/0712\\_020712\\_drugdogs.html](http://news.nationalgeographic.com/news/2002/07/0712_020712_drugdogs.html) (last visited June 22, 2012) (describing the “stunning” success of these dogs). This Court has recognized that “letting guilty and possibly dangerous defendants go free” not only imposes heavy costs on society and law enforcement, but indeed “offends basic concepts of the criminal justice system.” *Herring v. United States*, 555 U.S. 135, 141 (2009) (quoting *Leon*, 468 U.S. at 908)). So too here, where adopting the Florida Supreme Court’s rigid evidentiary requirements for establishing reliability almost certainly will result in the exclusion of evidence seized as a result of dog alerts.

Moreover, the requirements created by the Florida Supreme Court would create the perverse incentive of discouraging the use of a partner who is critically important to law enforcement in the field. Trained dogs are enormously important for the detection and interruption of drug supply chains. Law enforcement’s ability to prevent the importation and distribution of illegal drugs into Florida, or other States, would be materially diminished if the use of drug-detection dogs was curbed. In Florida alone, there are over 1,000 K-9 units. And in 2011 alone, Florida officers made over 130,000 drug arrests. See FDLE, *Total Arrests by County 2011*, [http://www.fdle.state.fl.us/Content/FSAC/Menu/Data—Statistics-\(1\)/UCR-Arrest-Data.aspx](http://www.fdle.state.fl.us/Content/FSAC/Menu/Data—Statistics-(1)/UCR-Arrest-Data.aspx) (last visited June 22, 2012). Likewise, the U.S. Customs and Border Protection has more than 1,200 trained detection dogs. *Detector Dogs*, CPB’s “*Secret Weapons*,” *supra*. Numerous other federal agencies as well as law enforcement officials in all 50 States rely daily on such dogs as well.

But illegal drugs of course are not the only contraband that dogs are trained to detect. Dogs have been trained to alert to everything from illegal fruits and vegetables, to pirated DVDs, to human remains. See Part B, *supra*; Mike Lee, *Detection Dogs Guard Against Pests in Agricultural Contraband*, S. Diego Union Trib., Aug. 30, 2010, at A1; Jennifer Lee, *Dogs and Discriminating Noses Are Following New Career Paths*, N.Y. Times, June 13, 2006, at A1. And as any airport traveler or those who frequent government buildings including courthouses can appreciate, well-trained explosives-detection dogs may be the most important of all. But whatever they are trained to detect, K-9 dogs serve a vitally important law enforcement role. The Florida Supreme Court's decision in this case could severely compromise that role. The potentially enormous societal costs of the Florida Supreme Court's rule cannot be justified.

#### **E. Probable Cause Existed To Search Respondent's Vehicle**

The Florida Supreme Court erred in concluding that Officer Wheetley lacked probable cause to search respondent's vehicle after Aldo's alert. The fact that Aldo is a well-trained dog alone establishes that Officer Wheetley reasonably determined that his alert created a fair probability that respondent's truck contained contraband or evidence of a crime. And the evidence that the State submitted at the suppression hearing to show that Aldo was well-trained went far beyond that necessary to satisfy the Fourth Amendment.

The evidence showed that Aldo received hundreds of hours of narcotics-detection training. He successfully completed his first training course in 2004,



a 120-hour narcotics-detection training course with the City of Apopka, Florida Police Department. That course included methamphetamine detection, in addition to cannabis, cocaine, ecstasy, and heroin. JA 102. Aldo also successfully completed a certification exam administered by Drug Beat K-9 Certifications. JA 104. That certification further confirms Aldo's ability to reliably detect methamphetamine, among other drugs. JA 105.<sup>8</sup> In early 2006, Aldo and Officer Wheatley also completed a 40-hour training seminar with multiple canine trainers at the Dothan, Alabama Police Department. JA 54. In addition, as discussed, Officer Wheatley—who made the decision to search the truck—was himself a well-trained K-9 handler. JA 53.

Aldo also continued to be tested—and performed well—in weekly training exercises with Officer Wheatley. To maintain and develop Aldo's talents, a typical session involved Officer Wheatley hiding drugs in eight or so abandoned vehicles and allowing Aldo to detect the drugs. Officer Wheatley left multiple "blanks" (*i.e.*, vehicles without any drugs) "to ensure that the dog was not alerting or showing an odor response to a vehicle that did not have narcotics." JA 57. Officer Wheatley continued this training method every week for four hours. JA 56. This

---

<sup>8</sup> This certification lapsed during the time Aldo was already engaged in continuous weekly training with Officer Wheatley. But that does not diminish the significance of the fact that Aldo was certified. Indeed, in light of the regular and extensive training that Aldo received after certification, the fact that the certification had expired by the time of the search has little probative value. Moreover, there is no requirement that a well-trained dog be "certified" at all to establish reliability.

training regime far exceeded the amount of time that Aldo was actively deployed in the field. JA 60.

Officer Wheatley described Aldo's performance in these training sessions as "good. It was really good." *Id.* He elaborated that, if there were eight vehicles with drugs in them, Aldo would alert to eight. JA 60. Good indeed. That testimony is highly probative because not only was Officer Wheatley himself trained in K-9 drug detection, but he knows Aldo better than anyone given the hundreds of hours they have spent training—and working—together. And neither respondent nor the Florida Supreme Court identified any basis to discount or discredit that testimony. Aldo's training records—and 100% "satisfactory" performance in training—overwhelmingly support Officer Wheatley's testimony as well. JA 106–116.

Aldo had been on every patrol with Officer Wheatley for almost a year by the time they conducted the search at issue. When Officer Wheatley retrieved Aldo to sniff respondent's truck, Aldo's extensive training took over and he alerted to the odor of contraband. JA 63. Officer Wheatley described Aldo's alert to the presence of drugs as follows:

He will get excited. He will take a long sniff. His heart rate will accelerate. His feet will start pattering. He will—also, the main thing is [he will] sit.

JA 57. Aldo's alert—based on behavior honed in hundreds of hours of narcotics-detection training, mostly with Officer Wheatley himself—told Officer Wheatley that there was at least a "fair probability" that respondent's truck contained contraband, and thus established probable cause to search the vehicle.



As this Court's cases make clear, probable cause in no way depends on hindsight. *Devenpeck*, 543 U.S. at 152. Contraband found during a search does not retroactively establish that probable cause existed beforehand. And the fact that a search does not uncover contraband hardly negates probable cause that existed before the search. The fact that Officer Wheatley discovered only the precursors to methamphetamine, rather than methamphetamine itself, is therefore of no moment. See, e.g., *Robinson*, 707 F.2d at 815 (once a dog trained to detect certain substances alerts, "the fact that a different controlled substance was actually discovered does not vitiate the legality of the search"). Probable cause asks only whether Officer Wheatley was justified under the circumstances in believing that there was there was a "fair probability" respondent's car contained drugs at the time Aldo alerted. *Gates*, 462 U.S. at 238. Because Aldo was a well-trained dog, a fair probability—at least—existed at the time of the alert.

Once Aldo alerted to respondent's vehicle, Officer Wheatley made a reasonable and common-sense decision to search the truck for illegal drugs or evidence of a crime. Under the Fourth Amendment, not to mention this Court's precedents, he had probable cause to do so. He and his partner, Aldo, had not only performed well within the Constitution's demands, they had performed exactly the way law enforcement should. In the circumstances, no reasonable police officer would have allowed respondent simply to go on his way without searching his vehicle first.

## CONCLUSION

For foregoing reasons, the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

GREGORY G. GARRE  
*Counsel of Record*  
 BRIAN D. SCHMALZBACH\*  
*Special Assistant*  
*Attorneys General*  
 LATHAM & WATKINS LLP  
 555 Eleventh Street, NW  
 Suite 1000  
 Washington, DC 20004  
 (202) 637-2207  
 gregory.garre@lw.com

\* Admitted only in  
 Maryland; all work  
 supervised by a member  
 of the DC Bar

PAMELA JO BONDI  
*Attorney General of*  
*Florida*  
 CAROLYN M. SNURKOWSKI  
*Associate Deputy*  
*Attorney General*  
 ROBERT J. KRAUSS  
*Chief-Assistant*  
*Attorney General*  
 SUSAN M. SHANAHAN  
*Assistant Attorney*  
*General*  
 OFFICE OF THE ATTORNEY  
 GENERAL  
 3507 E. Frontage Road  
 Suite 200  
 Tampa, FL 33607-7013

JUNE 2012

# **RESPONDENT'S BRIEF**

AUG 24 2012

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

**In The  
Supreme Court of the United States**

STATE OF FLORIDA,

*Petitioner,*

CLAYTON HARRIS,

*Respondent.*

**On Writ Of Certiorari To The  
Supreme Court Of Florida**

**BRIEF FOR RESPONDENT**

NANCY A. DANIELS  
Public Defender  
SECOND JUDICIAL CIRCUIT  
OF FLORIDA

GLEN P. GIFFORD  
Assistant Public Defender  
301 S. Monroe St., Suite 401  
Tallahassee, FL 32301  
(850) 606-8500  
glen.gifford@flpd2.com  
*Counsel of Record*

*Attorneys for Respondent*

## **QUESTION PRESENTED**

Does a handler's perception of a dog's alert automatically create probable cause under the Fourth Amendment to search a vehicle without a warrant when the dog had an expired drug-detector certification with a different handler and the dog's reliability with its current handler is not established?

## TABLE OF CONTENTS

|                                                                                                                                                                                 | Page |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| QUESTION PRESENTED.....                                                                                                                                                         | i    |
| TABLE OF CONTENTS .....                                                                                                                                                         | ii   |
| TABLE OF AUTHORITIES.....                                                                                                                                                       | iv   |
| STATEMENT OF THE CASE.....                                                                                                                                                      | 1    |
| SUMMARY OF THE ARGUMENT.....                                                                                                                                                    | 7    |
| ARGUMENT.....                                                                                                                                                                   | 9    |
| UNDER THE TOTALITY OF THE CIRCUM-<br>STANCES, THE ALERT BY A DRUG-<br>DETECTOR DOG OF UNPROVEN RELIA-<br>BILITY FAILED TO CREATE PROBABLE<br>CAUSE TO SEARCH HARRIS' TRUCK..... | 9    |
| A. Probable cause from a drug-detector dog<br>alert turns on whether the dog reliably<br>alerts only to contraband .....                                                        | 11   |
| B. The reliability of a drug-detector dog in<br>justifying the warrantless search of an<br>automobile must be determined from the<br>totality of the circumstances .....        | 15   |
| C. A drug-detector dog alert is more like the<br>tip from a confidential informant than in-<br>formation from other types of sources re-<br>lied upon by police .....           | 19   |
| D. Recent field performance gauges a dog's<br>reliability as an indicator that drugs will<br>be found in a vehicle.....                                                         | 25   |
| 1. Field alert history gauges proficiency<br>in the same type of setting as the<br>alert under review .....                                                                     | 27   |

## TABLE OF CONTENTS – Continued

|                                                                                                                                                                                                             | Page |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 2. Handlers sometimes identify dog alerts where no drugs have been present, because the dogs detect odors from legal substances or because of handler errors.....                                           | 33   |
| E. Field performance recordkeeping is standard for drug-detector dogs and is often considered by courts .....                                                                                               | 36   |
| F. Lapsed certification or certification with a different handler increases the need for evidence of accuracy in real-world settings .....                                                                  | 43   |
| G. A “totality of the circumstances” approach to canine sniff reliability does not substantially burden the courts or the government.....                                                                   | 47   |
| H. Requiring the State to produce field performance records is logical, reasonable, and workable .....                                                                                                      | 52   |
| I. The facts known to the officer did not reasonably justify a belief that drugs or other evidence of criminal activity would be found in the truck after the dog alerted to the driver’s door handle ..... | 57   |
| CONCLUSION.....                                                                                                                                                                                             | 60   |



## TABLE OF AUTHORITIES

|                                                                                                                                                   | Page          |
|---------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| CASES                                                                                                                                             |               |
| <i>Aguilar v. Texas</i> , 378 U.S. 108 (1964) .....                                                                                               | 20, 21        |
| <i>Arizona v. Gant</i> , 129 S. Ct. 1710 (2009) .....                                                                                             | 31            |
| <i>Blalock v. State</i> , 37 Fla. L. Weekly D1719 (Fla.<br>1st DCA July 19, 2012) .....                                                           | 29, 54, 55    |
| <i>Brinegar v. United States</i> , 338 U.S. 160 (1949) .....                                                                                      | 16, 18        |
| <i>California v. Carney</i> , 471 U.S. 386 (1985) .....                                                                                           | 18, 19        |
| <i>Carroll v. United States</i> , 267 U.S. 132 (1925) .....                                                                                       | 16, 18        |
| <i>Chambers v. Maroney</i> , 399 U.S. 42 (1970) .....                                                                                             | 31            |
| <i>City of Indianapolis v. Edmond</i> , 531 U.S. 32<br>(2000) .....                                                                               | 13, 57        |
| <i>Com. v. Santiago</i> , 2012 WL 2913495 (Mass.<br>Superior 2012) .....                                                                          | 23, 42        |
| <i>Concrete Pipe &amp; Products of California, Inc. v.<br/>Constr. Laborers Pension Trust for S. Cali-<br/>fornia</i> , 508 U.S. 602 (1993) ..... | 52            |
| <i>Cooper v. Oklahoma</i> , 517 U.S. 348 (1996) .....                                                                                             | 52            |
| <i>Dawson v. State</i> , 518 S.E.2d 477 (1999) .....                                                                                              | 53            |
| <i>Davis v. United States</i> , 131 S. Ct. 2419 (2011) .....                                                                                      | 51            |
| <i>Doe v. Renfrow</i> , 475 F. Supp. 1012 (N.D. Ind.<br>1979), <i>aff'd in part</i> , 631 F.2d 91 (7th Cir.<br>1980) .....                        | 9, 25, 29, 36 |
| <i>Fitzgerald v. State</i> , 837 A.2d 989 (Md. Ct. Spec.<br>App. 2003), <i>aff'd</i> , 864 A.2d 1006 (Md. 2004) .....                             | 24            |
| <i>Florida v. Jardines</i> , No. 11-564 .....                                                                                                     | 33, 34        |

## TABLE OF AUTHORITIES – Continued

|                                                                                                                              | Page               |
|------------------------------------------------------------------------------------------------------------------------------|--------------------|
| <i>Florida v. Royer</i> , 460 U.S. 491 (1983).....                                                                           | 12, 59             |
| <i>Harris v. State</i> , 71 So. 3d 756 (Fla. 2011).....                                                                      | <i>passim</i>      |
| <i>Harris v. State</i> , 989 So. 2d 1214 (Fla. 1st DCA<br>2008), <i>quashed</i> , 71 So. 3d 756 (Fla. 2011).....             | 5                  |
| <i>Horton v. Goose Creek Independent School<br/>Dist.</i> , 690 F.2d 470 (5th Cir. 1982).....                                | 9, 25, 29          |
| <i>Illinois v. Caballes</i> , 543 U.S. 405<br>(2005).....                                                                    | 13, 14, 19, 29, 57 |
| <i>Illinois v. Gates</i> , 462 U.S. 213 (1983)....                                                                           | 17, 21, 22, 51, 59 |
| <i>Joe v. State</i> , 73 So. 3d 791 (Fla. 5th DCA 2011),<br><i>rev. denied</i> , 2012 WL 1997091 (Fla. May 31,<br>2012)..... | 55                 |
| <i>Jones v. Commonwealth</i> , 670 S.E.2d 727 (Va.<br>2009).....                                                             | 22                 |
| <i>Ker v. California</i> , 374 U.S. 23 (1963).....                                                                           | 17                 |
| <i>Maryland v. Pringle</i> , 540 U.S. 366 (2003) .....                                                                       | 17                 |
| <i>Matheson v. State</i> , 870 So. 2d 8 (Fla. 5th DCA<br>2003).....                                                          | 28, 51, 56, 57     |
| <i>McCray v. Illinois</i> , 386 U.S. 300 (1967).....                                                                         | 20, 21, 32         |
| <i>Merrett v. Moore</i> , 58 F.3d 1547 (11th Cir. 1995).....                                                                 | 15, 36             |
| <i>Mincey v. Arizona</i> , 437 U.S. 385 (1978).....                                                                          | 53                 |
| <i>Ohio v. Robinette</i> , 519 U.S. 33 (1996) .....                                                                          | 59                 |
| <i>Ornelas v. United States</i> , 517 U.S. 690 (1996) .....                                                                  | 17                 |
| <i>Pennsylvania v. Labron</i> , 518 U.S. 938 (1996).....                                                                     | 18                 |

## TABLE OF AUTHORITIES – Continued

|                                                                                                                                         | Page           |
|-----------------------------------------------------------------------------------------------------------------------------------------|----------------|
| <i>People v. Stillwell</i> , 129 Cal. Rptr. 3d 233 (Cal. Ct. App. 2011).....                                                            | 47             |
| <i>Spinelli v. United States</i> , 393 U.S. 410 (1969) ....                                                                             | 20, 21, 22     |
| <i>State v. Coleman</i> , 911 So. 2d 259 (Fla. 5th DCA 2005), <i>disapproved</i> , <i>Harris v. State</i> , 71 So. 3d 756 (2011) .....  | 52, 54         |
| <i>State v. England</i> , 19 S.W.3d 762 (Tenn. 2000).....                                                                               | 41             |
| <i>State v. Foster</i> , 252 P.3d 292 (Or. 2011).....                                                                                   | 31, 34, 42, 51 |
| <i>State v. Helzer</i> , 252 P.3d 288 (Or. 2011).....                                                                                   | 42             |
| <i>State v. Howard</i> , 803 N.W.2d 450 (Neb. 2011) ....                                                                                | 37, 41, 42     |
| <i>State v. Howard</i> , 24 P.3d 44 (Idaho 2001).....                                                                                   | 51             |
| <i>State v. Laveroni</i> , 910 So. 2d 333 (Fla. 4th DCA 2005), <i>disapproved</i> , <i>Harris v. State</i> , 71 So. 3d 756 (2011) ..... | 52, 54         |
| <i>State v. Nguyen</i> , 726 N.W.2d 871 (S.D. 2007).....                                                                                | 41             |
| <i>State v. Nguyen</i> , 811 N.E.2d 1180 (Ohio Ct. App. 2004) .....                                                                     | 34, 54         |
| <i>State v. Wright</i> , 2009 WL 2411298 (Ariz. Ct. App. 2009) .....                                                                    | 28             |
| <i>United States v. Beltran-Palafox</i> , 731 F. Supp. 2d 1126 (D. Kan. 2010) .....                                                     | 37             |
| <i>United States v. Bowman</i> , 660 F.3d 338 (8th Cir. 2011) .....                                                                     | 39             |
| <i>United States v. Cedano-Arellano</i> , 332 F.3d 568 (9th Cir. 2003) .....                                                            | 54             |

## TABLE OF AUTHORITIES – Continued

|                                                                                                                                  | Page       |
|----------------------------------------------------------------------------------------------------------------------------------|------------|
| <i>United States v. Chadwick</i> , 433 U.S. 1 (1977),<br>abrogated by <i>California v. Acevedo</i> , 500 U.S.<br>565 (1982)..... | 11, 12     |
| <i>United States v. Christian</i> , 452 Fed. Appx. 283<br>(4th Cir. 2011).....                                                   | 39         |
| <i>United States v. Florez</i> , 871 F. Supp. 1411<br>(D.N.M. 1994).....                                                         | 39         |
| <i>United States v. Gonzalez-Acosta</i> , 989 F.2d 384<br>(10th Cir. 1993) .....                                                 | 54         |
| <i>United States v. Gregory</i> , 302 F.3d 805 (8th Cir.<br>2002) .....                                                          | 37         |
| <i>United States v. Grubbs</i> , 547 U.S. 90 (2006) .....                                                                        | 17, 27     |
| <i>United States v. Grupee</i> , 682 F.3d 143 (1st Cir.<br>2012) .....                                                           | 40         |
| <i>United States v. Heir</i> , 107 F. Supp. 2d 1088 (D.<br>Neb. 2000) .....                                                      | 36         |
| <i>United States v. Howard</i> , 621 F.3d 433 (6th Cir.<br>2010).....                                                            | 10, 43, 44 |
| <i>United States v. Jodoin</i> , 672 F.2d 232 (1st Cir.<br>1982) .....                                                           | 51         |
| <i>United States v. Kennedy</i> , 131 F.3d 1371 (10th<br>Cir. 1997) .....                                                        | 47         |
| <i>United States v. Limares</i> , 269 F.3d 794 (7th Cir.<br>2001) .....                                                          | 39         |
| <i>United States v. Ludwig</i> , 641 F.3d 1243 (10th<br>Cir. 2011) .....                                                         | 46         |

## TABLE OF AUTHORITIES – Continued

|                                                                                                                         | Page           |
|-------------------------------------------------------------------------------------------------------------------------|----------------|
| <i>United States v. Maple</i> , 348 F.3d 260 (D.C. Cir. 2003) .....                                                     | 53             |
| <i>United States v. McGlothlen</i> , 2008 WL 4533971 (D. Neb. 2008) .....                                               | 54             |
| <i>United States v. Ortiz</i> , 422 U.S. 891 (1975) .....                                                               | 15             |
| <i>United States v. Outlaw</i> , 134 F. Supp. 2d 807 (W.D. Tex 2001), <i>aff'd</i> , 319 F.3d 701 (5th Cir. 2003) ..... | 36             |
| <i>United States v. Patten</i> , 183 F.3d 1190 (10th Cir. 1999) .....                                                   | 34             |
| <i>United States v. Paulson</i> , 2 M.J. 326 (A.F.C.M.R. 1976) .....                                                    | 44             |
| <i>United States v. Perez-Almonte</i> , 2012 WL 2109397 (9th Cir. 2012) .....                                           | 40             |
| <i>United States v. Place</i> , 462 U.S. 696 (1983) .....                                                               | 12, 13, 26     |
| <i>United States v. Prokupek</i> , 2009 WL 2634446 (D. Neb. 2009), <i>rev'd</i> , 632 F.3d 460 (8th Cir. 2011) .....    | 37             |
| <i>United States v. Riley</i> , 351 F.3d 1265 (D.C. Cir. 2003) .....                                                    | 23             |
| <i>United States v. Robinson</i> , 390 F.3d 853 (6th Cir. 2004) .....                                                   | 47, 48, 49     |
| <i>United States v. Ross</i> , 456 U.S. 798 (1982) .....                                                                | 16, 17, 18, 19 |
| <i>United Statues v. Ruiz</i> , 664 F.3d 833 (10th Cir. 2012) .....                                                     | 40             |

## TABLE OF AUTHORITIES – Continued

|                                                                                                                                                  | Page           |
|--------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| <i>United States v. Sellers</i> , 483 F.2d 37 (5th Cir. 1973), <i>overruled by United States v. McKeever</i> , 905 F.2d 829 (5th Cir. 1990)..... | 23             |
| <i>United States v. \$67,220.00 in U.S. Currency</i> , 957 F.2d 280 (6th Cir. 1992) .....                                                        | 51             |
| <i>United States v. Smith</i> , 448 Fed. Appx. 936 (11th Cir. 2011).....                                                                         | 40             |
| <i>United States v. Stubblefield</i> , 682 F.3d 502 (6th Cir. 2012).....                                                                         | 39             |
| <i>United States v. Trayer</i> , 898 F.2d 805 (D.C. Cir. 1990) .....                                                                             | 34             |
| <i>United States v. Wood</i> , 915 F. Supp. 1126 (D. Kan. 1996), <i>rev'd</i> , 106 F.3d 942 (10th Cir. 1997) .....                              | 24, 46, 53, 54 |
| <i>Whren v. United States</i> , 517 U.S. 806 (1996).....                                                                                         | 16             |
| <i>Wiggs v. State</i> , 72 So. 3d 154 (Fla. 2d DCA 2011) .....                                                                                   | 55, 56, 57     |

## CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment IV .....*passim*

## STATUTES

|                                                          |    |
|----------------------------------------------------------|----|
| 50 Illinois Compiled Statutes 705/10.12 (2012) .....     | 46 |
| Oklahoma Statutes Title 70, Section 3311 (2012).....     | 45 |
| South Dakota Codified Laws Section 23-3-35.4 (2012)..... | 45 |



## TABLE OF AUTHORITIES – Continued

|                                                                                                                                                                                                                                                                                                                                                                                                                           | Page   |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| OTHER SOURCES                                                                                                                                                                                                                                                                                                                                                                                                             |        |
| American Police Canine Association, <i>Your Records Will Matter</i> , <a href="http://www.theapca.com/content.php?page=legal">http://www.theapca.com/content.php?page=legal</a> .....                                                                                                                                                                                                                                     | 38     |
| American Working Dog Association mission statement, <a href="http://www.nndda.org/about-nndda">http://www.nndda.org/about-nndda</a> .....                                                                                                                                                                                                                                                                                 | 26     |
| Radley Balko, <i>Illinois State Police Drug Dog Unit Analysis Shows Error Rate Between 28 and 74 Percent</i> , Huffington Post, March 31, 2012, <a href="http://www.huffingtonpost.com/2012/03/31/drug-dog-illinois-state-police_n_1376091.html">http://www.huffingtonpost.com/2012/03/31/drug-dog-illinois-state-police_n_1376091.html</a> .....                                                                         | 30     |
| Robert C. Bird, <i>An Examination of the Reliability of the Narcotics Detection Dog</i> , 85 Ky. L.J. 405 (1997) .....                                                                                                                                                                                                                                                                                                    | passim |
| John J. Ensminger, <i>Police and Military Dogs: Criminal Detection, Forensic Evidence, and Judicial Admissibility</i> (2012) .....                                                                                                                                                                                                                                                                                        | 9      |
| Max A. Hanson, <i>Comment, United States v. Solis</i> , 13 San Diego L. Rev. 410 .....                                                                                                                                                                                                                                                                                                                                    | 39     |
| Dan Hinkel and Joe Mahr, <i>Tribune Analysis: Drug-sniffing dogs in traffic stops often wrong</i> , Chicago Tribune, January 6, 2011, <a href="http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog">http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog</a> ..... | 29, 30 |



## TABLE OF AUTHORITIES – Continued

|                                                                                                                                                                                                                                                                                                                                                                                     | Page           |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| Dave Hunter, <i>Common Scents: Establishing A Presumption of Reliability for Detector Dog Teams Used in Airports in Light of the Current Terrorist Threat</i> , 28 U. Dayton L. Rev. 89 (2002).....                                                                                                                                                                                 | 46             |
| Illinois Law Enforcement Training and Standards Board, Implementation of Narcotic Detection Canine Minimum Certification Requirements .....                                                                                                                                                                                                                                         | 46             |
| International Forensic Research Institute/ National Forensic Science Technology Center, Draft Best Practices Guidelines for Detector Dog Teams, <a href="http://www2.fiu.edu/~ifri/detector%20dogs/DRAFT%20Detector%20Dog%20Best%20Practices%205%2023%202003.pdf">http://www2.fiu.edu/~ifri/detector%20dogs/DRAFT%20Detector%20Dog%20Best%20Practices%205%2023%202003.pdf</a> ..... | 38             |
| International Forensic Research Institute/ National Forensic Science Technology Center, IFRI/NFSTC Certification Guidelines, <a href="http://www2.fiu.edu/~ifri/detector%20dogs/K9%20Certification%20IFRI%20NFSTC%206%202003.pdf">http://www2.fiu.edu/~ifri/detector%20dogs/K9%20Certification%20IFRI%20NFSTC%206%202003.pdf</a> .....                                              | 26, 27, 44, 45 |
| International Police Working Dog Association Certification Rules, Narcotics Detection, <a href="http://www.ipwda.org/narcotics.php">http://www.ipwda.org/narcotics.php</a> .....                                                                                                                                                                                                    | 49             |
| Lewis R. Katz and Aaron P. Golombiewski, <i>Curbing the Dog: Extending the Protections of the Fourth Amendment to Police Drug Dogs</i> , 85 Neb. L. Rev. 758 (2007).....                                                                                                                                                                                                            | 14, 33, 43     |

## TABLE OF AUTHORITIES – Continued

|                                                                                                                                                                                                                                                                                                                  | Page               |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| Wayne R. LaFave, <i>Search and Seizure: A Treatise on the Fourth Amendment</i> (4th ed. 2004) .....                                                                                                                                                                                                              | 38, 53             |
| Lit, Lisa, et al., <i>Handler beliefs affect scent detection dog outcomes</i> , Anim. Cogn. (2011) 14:387-394, <a href="http://www.springerlink.com/content/j477277481125291/fulltext.pdf?MUD=MP">http://www.springerlink.com/content/j477277481125291/fulltext.pdf?MUD=MP</a> .....                             | 9, 35              |
| Leslie A. Lunney, <i>Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home</i> , 88 Or. L. Rev. 829 (2009) .....                                                                                                                             | 34, 35             |
| M.S. Macias et al., <i>A Comparison of Real Versus Simulated Contraband VOCs for Reliable Detector Dog Training Utilizing SPME-CG-MS</i> , 40 Am. Lab. 16 (Jan. 2008) .....                                                                                                                                      | 33                 |
| Richard E. Meyers II, <i>Detector Dogs and Probable Cause</i> , 14 Geo. Mason L. Rev. 1 (2006) .....                                                                                                                                                                                                             | 15, 22, 23, 28, 38 |
| Richard E. Myers II, <i>In the Wake of Caballes, Should We Let Sniffing Dogs Lie?</i> , 20 Crim. Just. 4 (Winter 2006) .....                                                                                                                                                                                     | 35                 |
| National Narcotic Detector Dog Association, "About the NNDDA," <a href="http://www.nndda.org/about-nndda">http://www.nndda.org/about-nndda</a> .....                                                                                                                                                             | 26                 |
| National Narcotic Dog Detector Association – Narcotic Detection Standards, <a href="http://www.nndda.org/official-docs/doc_view/2-narcotics-detection-standard?tmpl=component&amp;format=raw">http://www.nndda.org/official-docs/doc_view/2-narcotics-detection-standard?tmpl=component&amp;format=raw</a> ..... | 49                 |

TABLE OF AUTHORITIES – Continued

|                                                                                                                                                                                                                                                | Page           |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| Scientific Working Group on Dog and Orthogonal<br>Detector Guidelines, Approved Guidelines for<br>Substance Dogs: Narcotics (available at <a href="http://www.swgdog.org">http://www.swgdog.org</a> ).....                                     | 26, 38, 44, 46 |
| United States Police Canine Association, Inc.,<br>Rules and Regulations for Certification<br>(2012), <a href="http://www.uspcak9.com/certification/USPCARulebook2012.pdf">http://www.uspcak9.com/certification/USPCARulebook2012.pdf</a> ..... | 44, 49, 50     |
| <br>COURT RULES                                                                                                                                                                                                                                |                |
| Florida Administrative Code R. 11B-27.013<br>(2012).....                                                                                                                                                                                       | 45             |

## STATEMENT OF THE CASE

This case involves a dog with an expired drug-detector certification that twice alerted to a truck that did not have drugs the dog was trained to detect, and a handler never certified as part of a detector team with this dog.

The canine half of the team, a German Shepherd named Aldo, initially trained and tested with Seminole County Deputy Sheriff William Morris. In January 2004, the Aldo/Morris team completed 120 hours of training which included detection of methamphetamine and other drugs. JA 102. Aldo was not trained to alert to pseudoephedrine, an ingredient in methamphetamine. JA 77-78. The next month, Aldo and Morris took a test administered by Drug Beat K-9 Certifications. JA 104. The exam was graded pass/fail, and the team passed by finding one sample of each of several drugs, one of them methamphetamine. JA 104. The passing grade earned the Aldo/Morris team a certificate for "accomplishment in K-9 drug certification," valid for one year from its February 13, 2004, issue date. JA 103. The search in this case occurred two years, four months later. Aldo had no solo certification apart from Deputy Morris and none at all with another officer.

The human half of the team in this case was Officer Todd Wheatley of the Liberty County Sheriff's Office. After training with a different dog, Wheatley obtained Aldo in July 2005. JA 53, 55. Aldo's age and the reason he changed agencies and handlers are not

part of the record. When Wheetley acquired Aldo, the certification with Deputy Morris was already five months out of date, but Wheetley did not obtain a new certification. Wheetley believed Aldo was not required to have a certification. JA 70. Asked whether a certification is lifelong, he stated, "As long as [the dog] shows proficiency in narcotics." JA 71. Florida does not have certification standards for narcotics dogs. JA 71.

Monthly training logs show that Aldo and Wheetley trained together in-house four hours each week from November 2005 through May 2006. JA 116. Wheetley testified that Aldo's performance in training was "real good," and that he would alert to all vehicles containing drugs. JA 60. The monthly training logs show a daily training rating of satisfactory rather than unsatisfactory, although performance was not rated in several instances. JA 106-16. The logs do not reflect whether Aldo alerted to any vehicles without drugs. JA 106-16. Wheetley and Aldo completed a Dothan, Alabama, Police Department seminar in February 2006. The record does not show that the 40-hour seminar involved any proficiency testing. JA 105.

Wheetley used Aldo on the road to sniff vehicles for drugs about five times per month. JA 60. Wheetley did not record instances when Aldo alerted but no arrest resulted. JA 74.

On June 24, 2006, Wheetley pulled over Harris' pickup truck for an expired tag. JA 61. Wheetley

testified during the suppression hearing that Harris was shaking and breathing rapidly, and Wheatley saw an open beer can in a cup holder. JA 62. Harris denied consent to search, so Wheatley retrieved Aldo and deployed him for a free-air sniff of the truck's exterior. JA 63. Aldo alerted to the driver's door handle by becoming excited and sitting, according to the officer. JA 63. Wheatley was the sole witness to Aldo's alert.<sup>1</sup>

Wheatley patted Harris down, put him in the back of the patrol car, and searched Harris' truck. JA 64-65. In the cab, the officer found 200 loose pseudoephedrine pills wrapped in a shirt under the driver's seat and a bag containing eight boxes of matches on the passenger side. JA 65, 78. He also seized muriatic acid from a toolbox in the bed of the truck, and "Heet" brand gas line antifreeze and coffee filters with iodine crystals from the truck bed. JA 11, 65, 78. Harris told Wheatley he purchased the items to cook methamphetamine. JA 67. On June 29, 2006, the State charged Harris with possession of pseudoephedrine for use in making methamphetamine. JA 13-14.

Defense counsel moved to suppress the physical evidence from the June 24 search as the product of a

---

<sup>1</sup> Harris testified that the dog did not alert in any way, but his testimony was stricken when he exercised his constitutional right not to discuss his statements to Wheatley at the scene. JA 82-85.



warrantless search without probable cause. JA 15-19. Counsel asserted that the search was prompted by Aldo's false alert, and pointed to precedent requiring evidence of a dog's field performance record on a motion to suppress the fruits of a warrantless vehicle search prompted by a drug-detector dog alert. The motion also questioned whether Aldo had a valid certification at the time of the alert. JA 16-18.

During the suppression hearing, Wheatley explained that he believed Aldo alerted to the residual odor of methamphetamine on the door handle. JA 81. In Wheatley's experience, when Aldo alerted on a car door handle, it usually meant someone who touched or smoked narcotics had then touched the handle, leaving a residual smell. JA 80. Wheatley could not testify how long after contact Aldo could detect the residual odor. JA 80.

Wheatley also testified about a second stop and search of Harris' truck after June 24, which again did not result in the discovery of any drugs the dog was trained to detect.<sup>2</sup> Wheatley stopped Harris for a malfunctioning brake light and again deployed Aldo. JA 75. According to Wheatley, Aldo alerted in the same manner to the driver's door handle. That search

---

<sup>2</sup> Testimony by another officer showed that the second stop occurred four to six weeks before the October 12, 2006, suppression hearing, or about two months after the June 24 stop and search. JA 45.



yielded only an open liquor bottle and no criminal charges. JA 75-76.

The trial court denied the motion to suppress, but made no findings. Harris appealed the resulting conviction. The Florida First District Court of Appeal affirmed. *Harris v. State*, 989 So. 2d 1214 (Fla. 1st DCA 2008). The Florida Supreme Court quashed the lower court decision. *Harris v. State*, 71 So. 3d 756 (Fla. 2011). The Court concluded that probable cause was lacking for the search of Harris' truck under the totality of the circumstances, including: (1) the absence of evidence on the criteria necessary for Aldo's certification, (2) the State's failure to explain how long the residual odor to which Aldo alerted could remain detectable by a dog, (3) why a residual-odor alert should give rise to probable cause, and (4) the lack of evidence of Aldo's performance in the field. *Id.* at 773-74. The court also set out criteria for Florida trial courts to gauge the reliability of a dog whose alert is used to establish probable cause for a warrantless vehicle search:

[T]he State, which bears the burden of establishing probable cause, must present all records and evidence that are necessary to allow the trial court to evaluate the reliability of the dog. The State's presentation of evidence that the dog is properly trained and certified is the beginning of the analysis. Because there is no uniform standard for training and certification of drug-detection dogs, the State must explain the training and certification so that the trial court can evaluate how well the

dog is trained and whether the dog falsely alerts in training (and, if so, the percentage of false alerts). Further, the State should keep and present records of the dog's performance in the field, including the dog's successes (alerts where contraband that the dog was trained to detect was found) and failures ("unverified" alerts where no contraband that the dog was trained to detect was found). The State then has the opportunity to present evidence explaining the significance of any unverified alerts, as well as the dog's ability to detect or distinguish residual odors. Finally, the State must present evidence of the experience and training of the officer handling the dog. Under a totality of the circumstances analysis, the court can then consider all of the presented evidence and evaluate the dog's reliability.

71 So. 3d at 772.

In seeking either summary reversal or certiorari in this case, the State identified as the question presented whether the Florida Supreme Court decision conflicts with this Court's decisions "by holding that an alert by a well-trained narcotics detection dog certified to detect illegal substances is insufficient to establish probable cause for the search of a vehicle." This Court granted the writ.

---

## SUMMARY OF THE ARGUMENT

The State advocates putting blinders on judges inquiring into probable cause arising from a dog alert. Its test would allow evidence only on whether a "canine professional," whatever that may be, pronounced the dog properly trained. The test assumes the ideal dog, a "well-trained" creature that alerts only to contraband. Not all dogs used as drug detectors meet the test. Even after training, dogs sometimes alert to other dogs, to the odors of drugs no longer present, and to legal substances they mistake for drugs. Further, handler error in prompting or mistaking a dog alert is common.

The State's rule would erase the Fourth Amendment "totality of the circumstances" test to gauge whether an alert by a particular dog is a reliable indicator that contraband will be found in an automobile. Factoring field performance of the dog/handler team into the probable cause determination preserves the flexibility necessary to the case-by-case, probable cause inquiry required by the Fourth Amendment. Police agencies already keep field performance records. States with standards for drug-dog certifications require the record keeping. Certification organizations also recommend keeping field performance records. They recognize that field performance is an important ongoing check on the proficiency of the dog/handler team. Reliable field performance corresponds to evidence that a confidential informant has previously provided reliable information, necessary because an alert cannot be corroborated without

a search and a dog cannot communicate the rationale for an alert – whether the odor is weak or strong, fresh or stale. And a dog cannot be cross-examined in a suppression hearing.

The decision below calls for a relatively simple inquiry into the standards by which the dog was certified, evidence of training that includes false alerts as well as hits, and field-performance records. The State can then explain why unverified field alerts should be attributed to residual odors and how this affects probable cause. If defendants can view this information in discovery and see that the dog appears fairly reliable, fewer challenges to probable cause based on dog alerts may ensue. Further, even when a challenge is mounted, the State may be able to demonstrate probable cause from an alert by a less-than-reliable dog in combination with other facts arousing suspicion.

The burden of producing field-performance records must fall on the State, which uses drug-detector dogs and is obligated to justify warrantless searches. No matter how the information comes to the judge in a suppression hearing, placing the burden on the State will ensure this field-performance evidence is generated and maintained.

Here, even under the State's low threshold for a showing of reliability, the alert to the door handle of Harris' truck by a dog with a long-expired certification obtained with a different handler fell short of probable cause. Evidence of reliable field performance, had it

been presented, might have compensated for the expired and invalid certification and the State's failure to explain why an alert to residual odor on the door handle of Harris' truck rather than drugs inside the truck created probable cause to search.

---

## ARGUMENT

### **UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE ALERT BY A DRUG-DETECTOR DOG OF UNPROVEN RELIABILITY FAILED TO CREATE PROBABLE CAUSE TO SEARCH HARRIS' TRUCK.**

The dog may be man's best friend, but as sources of probable cause, canine alerts are subject to error and misinterpretation. Drug-detector dogs alert for reasons other than the odor or presence of drugs. Dogs alert when they smell other dogs. *Doe v. Renfrow*, 475 F. Supp. 1012, 1027 (N.D. Ind. 1979), *aff'd in part*, 631 F.2d 91 (7th Cir. 1980). They alert when they smell perfume that gives off an odor they think is a drug. *Horton v. Goose Creek Independent School Dist.*, 690 F.2d 470, 475 (5th Cir. 1982). They alert when they think humans want them to alert. Lisa Lit, et al., *Handler beliefs affect scent detection dog outcomes*, *Anim. Cogn.* (2011) 14:387-394. They alert to the lingering odor of drugs no longer present. Also, some dogs are more accurate than others, and, like people, dogs have good days and bad days. John J. Ensminger, *Police and Military Dogs: Criminal Detection, Forensic Evidence, and Judicial Admissibility*

11 (2012). Further, common experience shows that a dog's behavior changes over time. For these reasons, the mere fact that a dog has alerted to some part of the exterior of a car or truck alone cannot justify a search unless its handler reasonably believes and can establish that the dog is a reliable drug detector.

To justify using such a variable tool with little scrutiny, the State puts forth an ideal: the well-trained dog, one that alerts only in the presence of contraband. How can we know a dog is well trained? Because someone trained the dog, then that person, or someone else, declared the training a success. See *United States v. Howard*, 621 F.3d 433, 454 (6th Cir. 2010) (describing canine certification as "simply a statement by an institution that an individual has satisfactorily completed a particular course of study"). Once this occurs, the State says, the Court should defer to the "canine professional," i.e., typically one who profits from training and certifying dogs, and accept on faith that the dog's alert always justifies a search. State Br. at 24. This bright-line rule erases case- and dog-specific reasonableness determinations, regardless of whether the dog, though arguably "well trained," performs poorly in sniffing out drugs on patrol. By seeking a rule that shields judges from how infrequently a dog has successfully led its handler to drugs in comparable settings, the State avoids the Fourth Amendment "totality of the circumstances" test.



Even under the State's test, there was no probable cause here. The one-year certification that Aldo was "well-trained" depended on the dog's partnership with a different handler and expired more than a year before the search. Also, in two different stops of Harris, the dog alerted to what the officer claimed was residual odor on the door handle of the respondent's truck when there were no drugs inside the vehicle that the dog was trained to detect. This case shows why the reliability inquiry cannot be reduced to assurances that a dog is well-trained. Instead, courts must, as they always do, undertake a genuine, case-by-case assessment of the facts, i.e., the abilities and performance of the team of dog and handler working together.

**A. Probable cause from a drug-detector dog alert turns on whether the dog reliably alerts only to contraband.**

This case presents a question prompted by several of this Court's decisions: what must a police officer know, and be able to convey to a judge, to justify a reasonable belief that a drug-detector dog's alert to an automobile, without more, creates probable cause to search the vehicle without a warrant?

The canine sniff first appeared in this Court's precedent in *United States v. Chadwick*, 433 U.S. 1 (1977). There, law enforcement agents opened a footlocker following the alert of a narcotics detection dog. This Court ruled the warrantless search



unlawful, but added that the dog's alert would have justified issuance of a warrant. *Id.* at 85.<sup>3</sup> The dog's credentials were not in issue. In *Florida v. Royer*, 460 U.S. 491 (1983), police detained an airline passenger in a terminal until he consented to a search. This Court ruled the detention unlawful but added that "courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage. . . . A negative result would have freed Royer in short order; a positive result would have resulted in his justifiable arrest on probable cause." *Id.* at 505-06.

In *United States v. Place*, 462 U.S. 696 (1983), an unreasonably long detention not justified by reasonable suspicion rendered the seizure of luggage a Fourth Amendment violation. The Court went on to say that a sniff of luggage by a "well-trained narcotics detection dog" is not an unreasonable government intrusion. *Id.* at 706-07. The Court characterized a "well-trained" dog as one that "discloses only the presence or absence of narcotics," and "does not expose noncontraband items that otherwise would remain hidden from public view." *Id.* at 707. Justice Blackmun, concurring in the judgment, expressed misgivings about "the Court's haste to resolve the dog-sniff issue," which *Place* had not raised. *Id.* at 721, 723.

---

<sup>3</sup> *Chadwick's* requirement of a warrant to open closed containers seized pursuant to probable cause was abrogated in *California v. Acevedo*, 500 U.S. 565 (1991).

The Court invalidated a highway checkpoint for drugs that involved the use of dogs in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). The Court ruled the suspicionless seizure of motorists unjustified. Relying on its dicta in *Place*, the Court also stated that the use of sniff dogs was not “designed to disclose any information other than the presence or absence of narcotics” and therefore did not “transform the seizure into a search.” *Id.* at 40.

In *Illinois v. Caballes*, 543 U.S. 405 (2005), the Court held that police may conduct a dog sniff of the exterior of a car without reasonable suspicion of criminal activity. Although respondent Caballes questioned whether drug-detection dogs alert only to contraband, the Court found no record evidence or findings to support his argument. *Id.* at 409.<sup>4</sup> The Court stated that the use during a traffic stop of a “well-trained dog,” as defined in *Place*, generally does not implicate legitimate privacy interests. *Id.*

Dissenting in *Caballes*, Justice Souter challenged the characterization of the dog as unique in its ability to detect contraband and only contraband. Relying on a study identifying false alert rates as high as 60 percent, Justice Souter asserted that the “infallible dog . . . is a creature of legal fiction. [Its] supposed

---

<sup>4</sup> The Court noted that Caballes conceded that properly conducted dog sniffs generally reveal only the presence of contraband and did not suggest erroneous dog sniffs revealed legitimate private information. 543 U.S. at 409.

infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy.” 543 U.S. at 411 (Souter, J., dissenting).

The error rates cited by Justice Souter and reflected in other opinions and studies show that not all dogs are “well trained” in the sense that they alert only to contraband. As will be shown below, a dog that alerts falsely may be triggered by non-contraband. Searches that follow false alerts – or handler errors in identifying alerts – can expose innocent motorists’ personal effects to scrutiny as they wait on the side of the road or in an officer’s patrol car.

Further, if relatively few of the vehicles sniffed contain contraband, even a fairly accurate dog will alert in the absence of contraband at least as often as in its presence, resulting in many searches of innocent persons. Assume that a dog correctly alerts 90 percent of the time (a certification standard used by some organizations) and 10 percent of motorists subjected to a dog sniff possess drugs. For every 100 cars sniffed, the dog will correctly find 9 of the 10 that have drugs, miss one of the 10, and alert falsely to the vehicles of 9 of the remaining 90 innocent motorists. If only 1 of 100 cars checked have drugs, the same dog is likely to alert to that car but to falsely alert to 9 cars of innocent motorists.<sup>5</sup> The

---

<sup>5</sup> Variations on these scenarios and the underlying rationale can be found in Lewis R. Katz and Aaron P. Golombiewski, (Continued on following page)

impact of inaccuracy on the innocent traveling public is high. See, e.g., *Merrett v. Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995) (describing highway roadblock in which dogs alerted to 28 vehicles, leading to only one arrest for possession of narcotics). Consequently, dog sniffs are most effective and least intrusive when they are used to justify searching the vehicles of motorists already under reasonable suspicion for drug activity. See Robert C. Bird, *An Examination of the Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 430 (1997) (“Canines are less reliable when police use less of their own expertise”); Richard E. Myers, II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. 1, 17-18, 36 (2006); (advocating a “dog sniff plus additional indicia” requirement).<sup>6</sup>

**B. The reliability of a drug-detector dog in justifying the warrantless search of an automobile must be determined from the totality of the circumstances.**

A search of an automobile is a substantial invasion of privacy. *United States v. Ortiz*, 422 U.S. 891, 896 (1975). The mobility of cars and pervasive

---

*Curbing the Dog: Extending the Protections of the Fourth Amendment to Police Drug Dogs*, 85 Neb. L. Rev. at 758 (2007); Bird, 85 Ky. L. J. at 429-30; and Myers, 14 Geo. Mason L. Rev. at 12-18.

<sup>6</sup> At issue below in this case were the criteria necessary to show that the dog’s alert, as perceived by its handler, was enough to establish probable cause with little more.

regulation have yielded an exception to the Fourth Amendment requirement of a search warrant, but “not every traveler along the public highways may be stopped and searched at the officers’ whim, caprice or mere suspicion.” *Brinegar v. United States*, 338 U.S. 160, 177 (1949). Although police officers may detain a motorist for any driving infraction irrespective of underlying motivation, see *Whren v. United States*, 517 U.S. 806 (1996), they may search the interior of an automobile in the absence of consent only when they reasonably believe contraband or evidence of a crime will be found within. *United States v. Ross*, 456 U.S. 798, 808-09 (1982). The probable cause determination that renders a warrantless vehicle search permissible under the Fourth Amendment

must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers. “[A]s we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the [officer], which in the judgment of the court would make his faith reasonable.”

*Id.* at 808 (quoting *Carroll v. United States*, 267 U.S. 132, 161-62 (1925) (internal quotation omitted)). Further,

[t]he scope of a warrantless search based on probable cause is no narrower – and no broader – than the scope of a search authorized by a warrant supported by probable cause. Only



the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize.

*Id.* at 823.

Probable cause for a warrantless search depends on the totality of the circumstances. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). The principal components are a determination of the events leading up to the search and then the decision whether these historical facts, “viewed from the standpoint of an objectively reasonable police officer,” amount to probable cause. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). “Probable cause exists when ‘there is a fair probability that contraband or evidence of a crime will be found in a particular place.’” *United States v. Grubbs*, 547 U.S. 90, 95 (2006) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). “[P]robable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules.” *Pringle*, 540 U.S. at 370-71 (quoting *Gates*, 462 U.S. at 232). Probable cause is a “‘practical, nontechnical conception’ that deals with ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’” *Id.* at 370 (quoting *Gates*, 462 U.S. at 231). “Each case is to be decided on its own facts and circumstances.” *Ker v. California*, 374 U.S. 23, 33 (1963) (internal quotation marks omitted).

This Court's automobile-search cases have turned largely on the presence of circumstances excusing the absence of a warrant and the justification for searching a container in the vehicle, rather than whether probable cause supported a search of the vehicle itself. In *Carroll*, a Prohibition Era case, officers had several reasons to believe the defendants were transporting liquor: they had convincing evidence that the Carrolls were bootleggers who transported liquor from Detroit to Grand Rapids; they had bargained with an undercover agent to sell liquor; and were found on the road from Detroit to Grand Rapids in the same car they were in when they tried to sell to the agent. 267 U.S. at 160. In *Brinegar*, probable cause to stop and search the defendant for illegally transporting liquor rested on the officer's knowledge of the defendant's recent arrest for similar activity, observations of him loading large amounts of liquor into his truck on other occasions, and his location traveling from a known supply source toward a probable illegal market. 338 U.S. at 169-70. Probable cause in *Ross* rested on a tip from an informant who had previously supplied accurate information and who said he "had just seen Ross take narcotics from the trunk of his car in making a sale and heard him say he possessed additional narcotics." 456 U.S. at 817. In the two cases consolidated in *Pennsylvania v. Labron*, 518 U.S. 938 (1996), officers knew of the use of vehicles in drug transactions near the time of the search. *Id.* at 939. Similarly, in *California v. Carney*, 471 U.S. 386 (1985), questioning of a youth who had just exited the defendant's motor home corroborated



other evidence creating probable cause to believe that he was distributing a controlled substance from the vehicle. *Id.* at 388, 395. Whether the dog-sniff alert supplied probable cause in *Caballes* was not at issue in this Court.

This case concerns the reasonableness of a search based on information developed entirely during a traffic stop, which became a drug investigation when Harris refused consent to search and the officer deployed his drug-detector dog. The facts known by the officer about his dog were insufficient to reasonably justify a belief that after the dog alerted to the door handle of Harris' truck, a search of the truck would yield contraband. The officer knew of the dog's lapsed certification with a different handler, but did not know the results of searches following previous alerts while on patrol. An officer who "fails to keep records of his or her dog's performance in the field . . . is lacking knowledge important to his or her belief that the dog is a reliable indicator of drugs." *Harris*, 71 So. 3d at 772-73.

**C. A drug-detector dog alert is more like the tip from a confidential informant than information from other types of sources relied upon by police.**

When police officers use informants to justify a search, they must have reason to believe the information is accurate. In addition to *Ross*, in which the Court found probable cause from a reliable informant's

disclosure of his personal observations of the defendant's drug activity, other cases involving informants decided by this Court are instructive. In *Aguilar v. Texas*, 378 U.S. 108 (1964), the Court ruled insufficient an affidavit stating that "reliable information from a credible person" led the officer to believe the defendant possessed narcotics for sale and use at a premises. The Court required that the magistrate "be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was 'credible' or his information 'reliable.'" *Id.* at 114. *McCray v. Illinois*, 386 U.S. 300 (1967), involved a tip from an informant who had provided information about narcotics resulting in convictions 20 to 25 times. The informant identified the defendant as a person selling narcotics to others on the street. Officers then found the defendant in the location described, where he hurriedly walked away upon seeing the officers. *Id.* at 302-04. This Court concluded that probable cause supported the warrantless arrest of the defendant and search incident thereto. *Id.* at 304.

In *Spinelli v. United States*, 393 U.S. 410 (1969), the Court applied *Aguilar's* "two-pronged test," consisting of "basis of knowledge" and "veracity" prongs, to an affidavit relying on an informant's tip and information independently gathered by law enforcement. The tip alone was inadequate because the

affidavit lacked information demonstrating that the informant was reliable, a description how the informant acquired his information, or sufficient detail showing that the informant relied on more than rumor or reputation. *Id.* at 416. Additional support provided by FBI surveillance of Spinelli and an investigation of telephone company records did not add enough to the tip to justify a search warrant. *Id.* at 417-18.

In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court expanded the two-pronged test of *Aguilar* and *Spinelli* into a “totality of the circumstances” approach. The Court ruled that the “veracity” or “reliability” and “basis of knowledge” elements should not be considered separately; “a deficiency in one [element] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.” *Id.* at 231. As an example of a situation that might warrant a finding of probable cause, the Court mentioned a tip in which an informant of unusual reliability fails to thoroughly set forth the basis of his knowledge. *Id.* at 233.

Veracity usually comes from the prior record of the informant in providing reliable tips. See, e.g., *McCray*, 386 U.S. at 300 (relying on officers’ testimony they had relied on informant’s tips “20 or 25 times,” and that the information had led to convictions). Basis of knowledge can come from an explicit statement of how the informant acquired the information, or may be inferred from the wealth of information

within the tip. *Spinelli*, 393 U.S. at 416. Corroboration of part of the tip, even by innocent behavior, also plays a role. *Gates*, 462 U.S. at 244 n.13. Further, a deficiency on any one of these factors may be overcome by strong evidence on another factor. *Id.* at 213.

This precedent provides an analytical framework for detector-dog alerts. See *Harris*, 71 So. 3d at 767; *Jones v. Commonwealth*, 670 S.E.2d 727, 732 (Va. 2009) (analogizing detector dogs to confidential informants). A drug dog's alert is a tip concerning possible criminal activity. Properly interpreted by its handler, the alert by a dog with up-to-date training and a record of accuracy indicates the presence of one of the substances to which the dog is conditioned to alert. The dog acquired the information through its sense of smell and learned to communicate the information through training. See *Bird*, 85 Ky. L.J. at 411-12. The alert provides the handler no detail other than that the dog has detected an odor triggering the alert. See *Myers*, 14 Geo. Mason L. Rev. at 5 ("Part of the imprecision associated with alerting is that the dog cannot tell its handler what it is alerting to, and why.").

Because the alert communicates no other information, it cannot be corroborated before a search is commenced. Police may gather different facts to aid in the probable cause determination, but these facts do not corroborate the information provided by the dog that it has detected one of its signal odors. Nor does the alert communicate the dog's basis of knowledge. The dog cannot tell its handler whether

the scent is strong or weak, fresh or stale. See Myers, 14 Geo. Mason L. Rev. at 5. The dog cannot later explain its actions in a suppression hearing. Because a dog in alerting communicates less information than in the typical tip from a confidential informant, the grounds for crediting the information should be commensurately stronger. Cf. *United States v. Riley*, 351 F.3d 1265 (D.C. Cir. 2003) (finding probable cause from affidavit lacking any information on basis of informant's knowledge; informant provided reliable information 60 times, never provided false information, and had financial incentive to give accurate information); *United States v. Sellers*, 483 F.2d 37, 41 (5th Cir. 1973) (stating, in reviewing affidavit relying on informant who had furnished reliable information more than 100 times, that "the quantum of underlying circumstances which reveal the source of the informer's knowledge necessary to sustain the affidavit is clearly less than in cases where the indicia of informer reliability is less dramatic."), *overruled on other grounds by United States v. McKeever*, 905 F.2d 829 (5th Cir. 1990). The dog's past performance – whether in training, testing, or field deployment – is the only possible measure of the alert's reliability before the search has begun. See *Com. v. Santiago*, 2012 WL 2913495 (Mass. Superior Ct. 2012) ("[D]ue to the fact that assessment of the veracity and basis of knowledge for drug-detection dogs is more difficult than it is for anonymous informants, the dog's records of reliability become critical to any probable cause analysis.").



Several courts have rejected the comparison between drug-detector dogs and confidential informants. In their view, “[u]nlike an informant, the canine is trained and certified to perform what is best described as a physical skill,” and lacks “the personal and financial reasons and interest typically behind an informant’s decision to cooperate.” *Fitzgerald v. State*, 837 A.2d 989, 1009 (Md. Ct. Spec. App. 2003), *aff’d*, 864 A.2d 1006 (Md. 2004) (quoting *United States v. Wood*, 915 F. Supp. 1126, 1136 n.2 (D. Kan. 1996)). The court in *Fitzgerald* even ventured that “[c]ompetence aside,” dogs are “inherently less untruthful than people.” *Id.*<sup>7</sup> In this case the State takes the comparison two steps farther, likening dogs to citizen informants and human police officers who have “no secret vendettas or hidden rivalries.” State Br. at 28.

The analogy to inherently honest citizen informants and police officers is inapt. A confidential informant who gained his or her knowledge from a connection to criminal activity may be more likely to knowingly mislead police for personal gain than an innocent citizen who wishes only to help stop crime or a police officer with the same mission. A dog has neither the capacity to intentionally mislead nor the motive to stop crime. Its reasons for alerting are driven by scent, which it connects to reward. Its errors stem from this connection. For example, in

---

<sup>7</sup> This is an example of anthropomorphism. To the extent we see dogs as honest or devious, it is a character trait we impose upon them, not one they independently possess.

*Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd in part*, 631 F.2d 91 (7th Cir. 1980), a trained narcotics-detector dog alerted to a 13-year-old student during a school-wide "sniff" of other students. The dog continued to alert even though the student emptied her pockets. This led to a body search where the student was required to remove all her clothing. No drugs were found. It turned out that before coming to school that morning, the student had been playing with one of her dogs, and the dog was in heat. *Id.* at 1017. Another school search prompted by a canine alert led to the discovery of nothing more than a bottle of perfume in a student's purse. See *Horton v. Goose Creek Independent School Dist.*, 690 F.2d 470, 475 (5th Cir. 1982).

**D. Recent field performance gauges a dog's reliability as an indicator that drugs will be found in a vehicle.**

Petitioner and its amici argue that field performance is an inaccurate measure of drug-dog reliability. In their view, traffic stops are noncontrolled settings where officers cannot determine whether dogs are alerting to minute traces of narcotics, well-hidden narcotics, or the residual odor of narcotics no longer present.

The authorities cited for the State's position illustrate the different functions served by drug-dog trainers and courts responsible for deciding Fourth Amendment issues. Training and certification



organizations see their mission as preparing handlers and dogs to serve law enforcement. See National Narcotic Detector Dog Association, "About the NNDDA," <http://www.nndda.org/about-nndda>; American Working Dog Association mission statement, <http://www.nndda.org/about-nndda>. Courts "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. at 703. Training and certification testing are the laboratory in which dogs are prepared for work in the field. Deployments in real-world situations are the field tests. Canine reliability sufficient to make a dog field-ready is not the same as canine reliability justifying searches under the Fourth Amendment.

The United States cites to the Scientific Working Group on Dog and Orthogonal Detector Guidelines (SWGDOG) stating that evaluators "should know whether you have a false positive" in a certification procedure, but may not know whether the dog has given a false positive in "most operational situations." U.S. Br. at 18. But the determination whether a dog's alert is likely to lead to discovery of narcotics is made in the field, not in training and not in testing. Consequently, while they oppose using field performance as a criterion for certification, neither the guidelines for SWGDOG nor the International Forensic Research Institute/National Forensic Science Technology Center (IFRI/NFSTC) take a position on

the use of deployment logs as a factor in deciding probable cause.<sup>8</sup>

**1. Field alert history gauges proficiency in the same type of setting as the alert under review.**

The decision to search a car because of a dog alert occurs in the field, not a controlled setting. To search after a drug dog alerts, the officer must have probable cause to believe that evidence of a crime will be found, not that a vehicle may have once contained contraband or transported a person that had been in contact with contraband. “[T]he probable-cause requirement looks to whether evidence will be found when the search is conducted.” *United States v. Grubbs*, 547 U.S. 90, 95 (2006). If the dog’s track record shows that the dog frequently alerts to the past presence of drugs in or on a vehicle, the officer does not have probable cause to believe that a new alert will lead at that moment to the discovery of drugs in the vehicle:

Given the level of sensitivity that many dogs possess, it is possible that if the person being

---

<sup>8</sup> Without mentioning probable cause determinations, the IFRI/NFSTC guidelines state that deployment logs should not be used to determine reliability of the detection team. The organization works closely with law enforcement and has as one of its missions “courtroom defensibility.” IFRI/NFSTC Guidelines, <http://www2.fiu.edu/~ifri/detector%20dogs/K9%20Certification%20IFRI%20NFSTC%206%202003.pdf>.

searched had attended a party where other people were using drugs, the dog would alert because of the residue on clothing or fabric. It is possible that in a vehicle that had formerly been used to transport drugs, the dog would alert, despite the fact that drugs were no longer present. Or it is possible that some sort of residue normally associated with drugs was present.

*Harris*, 71 So. 3d at 769 (quoting *Myers*, 14 Geo. Mason L. Rev. at 4-5 (2006)); see also *Matheson v. State*, 870 So. 2d 8, 13 (Fla. 5th DCA 2003) (“The presence of a drug’s odor at an intensity detectable by the dog, but not by the officer, does not mean that the drug itself is present.”).

Here, the State did not present evidence explaining why an alert to residual odor on the door handle of Harris’ truck – if indeed, that is what the dog detected – warranted a reasonable belief that the officer would find drugs within. Wheetley, Aldo’s handler, testified that Aldo detected the odor of drugs transferred onto the door handle from a person’s hand. JA 79-80. An alert to odor on a door handle rather than from the interior of the vehicle creates only a mere possibility that drugs or other evidence of a crime will be found, not a fair probability.

Any unverified alert can be attributed to the possibility of a “residual odor” alert. See *State v. Wright*, 2009 WL 2411298, at \*5 (Ariz. Ct. App. 2009) (discussing trial court order stating that “real world” records substantiate concern raised by certification

records “unless it is accepted that actual drugs or residual odor was present in virtually all of the vehicles searched”). Without evidence showing that the alert is to residual odor and that this type of alert means drugs will probably be found within a vehicle, no unverified alert should be credited as a confirmed alert. See *Harris*, 71 So. 3d at 764-65 (stating that an alert to the odor of drugs not detectable by an officer “for Fourth Amendment purposes . . . is neither a false nor positive alert”).<sup>9</sup>

False alerts and handler errors also detract from reliability. The alerts in *Horton v. Goose Creek* and *Doe v. Renfrow* were false alerts. In his dissenting opinion in *Caballes*, Justice Souter pointed to evidence, including from artificial testing situations, showing that a dog that alerts hundreds of times will be wrong dozens of times. 543 U.S. at 412 (Souter, J., dissenting). The Chicago Tribune found in an analysis of three years of data from suburban police departments that only 44 percent of alerts by dogs to vehicles in roadside encounters led to the discovery of drugs or paraphernalia.” Further, “[f]or Hispanic drivers, the success rate was just 27 percent.” Dan Hinkel and Joe Mahr, *Tribune Analysis: Drug-sniffing dogs in traffic stops often wrong*, Chicago Tribune,

---

<sup>9</sup> A lower Florida court, applying *Harris*, has excluded alerts attributed to residual odor from the dog’s performance record, as either verified or false alerts. See *Blalock v. State*, 37 Fla. L. Weekly D1719 (Fla. 1st DCA July 19, 2012).

January 6, 2011.<sup>10</sup> A survey of Illinois State Police records over an 11-month period in 2007 and 2008 found that of 136 alerts, officers found no drugs at all in 38 cases. Thirty-six more alerts led to the alleged discovery of residue never sent to a lab. Radley Balko, *Illinois State Police Drug Dog Unit Analysis Shows Error Rate Between 28 and 74 Percent*, Huffington Post, March 31, 2012.<sup>11</sup> Presumably, the teams in these surveys had unexpired certifications. Neither reasonableness nor probable cause should tolerate this level of error. It is a danger to surrender Fourth Amendment discretion to a dog.

The State and amici suggest that even if a drug-detector dog alert does not create probable cause to believe the vehicle contains drugs, it justifies a search for guns, packaging, log books, precursor chemicals, and generally, paraphernalia. State Br. at 30, U.S. Br. at 13-14. Discovery of drug-related contraband after previous alerts is certainly pertinent to the dog's reliability. However, an alert gives no greater indication of the presence of these items than it does the drugs themselves. The mere possibility of a "residual odor" alert should not be used to justify the expansion of a limited search for the drugs presumably creating the odor into a general search for any illegal activity.

---

<sup>10</sup> Available at [http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105\\_1\\_drug-sniffing-dogs-alex-rothacker-drug-dog](http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog).

<sup>11</sup> Available at [http://www.huffingtonpost.com/2012/03/31/drug-dog-illinois-state-police\\_n\\_1376091.html](http://www.huffingtonpost.com/2012/03/31/drug-dog-illinois-state-police_n_1376091.html).



See *Chambers v. Maroney*, 399 U.S. 42, 50-51 (1970) (discussing “the circumstances that furnish probable cause to search a particular auto for particular articles”).

Further, if police searching a car after a dog alert first find drugs justifying an arrest, a search for additional evidence of that crime may be justified. *Arizona v. Gant*, 129 S.Ct. 1710, 1719 (2009). But absent discovery of drugs or other incriminating circumstances, there is little reason to believe that if the search that follows a dog alert does not turn up narcotics, it will instead yield contraband associated with narcotics or other evidence of criminal activity.

On this point, the State and amici cite *State v. Foster*, 252 P.3d 292, 301 (Or. 2011). There, the Oregon Supreme Court recognized that an officer has reason to believe that an alert will lead to discovery of an item associated with drug use, if not the drugs themselves, because the item likely has the residual odor of drugs. *Id.* at 299-300. In other words, it is the presence of drug residue on the item, albeit perhaps in minute quantities, that triggers the alert. In fact, the search that follows a dog’s alert sometimes yields both residual amounts of drugs and paraphernalia or other drug-related evidence. Nonetheless, probable cause continues to rise or fall on the reasonableness of a belief that narcotics will be found, not the lesser likelihood that the search will instead yield other evidence that bears the residual odor of drugs.

The State also assails the Florida Supreme Court for "attempting to create a quantified measure of probable cause." State Br. at 28. This misinterprets the decision below. First, that court had no field performance records to work with, giving it no opportunity to quantify probable cause. Second, the court never suggested it would reduce probable cause to a batting average. Instead, it stated that after records of "successful" and unverified alerts are presented, the State will have "the opportunity to present evidence explaining the significance of any unverified alerts, as well as the dog's ability to detect or distinguish residual odors alerts yielding contraband and others." 71 So. 3d at 772.

Third, because probable cause deals with probabilities, numerical expression of pertinent information enhances, rather than detracts from, the probable cause determination. This is especially the case when the government uses a source that has previously provided the same type of information to establish probable cause. *See, e.g., McCray*, 386 U.S. at 300, 304 (relying on officers' testimony they had relied on informant's tips 20-25 times, and that the information had resulted in convictions).

Just as it would be entirely relevant to know how many times an informant's tip resulted in contraband being discovered, the reason that the State should keep records of the dog's performance both in training and in the field is so that the trial court may adequately evaluate the reasonableness of the officer's



belief in the dog's reliability under the totality of the circumstances.

*Harris*, 71 So. 3d at 771.

**2. Handlers sometimes identify dog alerts where no drugs have been present, because the dogs detect odors from legal substances or because of handler errors.**

Dogs alert where no narcotics-related evidence is found for reasons other than residual odor of narcotics. False alerts can occur because the odor signatures used by dogs to identify drugs are also found in legal substances. When many dogs alert to cocaine, they are actually signaling the presence of methyl benzoate. M.S. Macias et al., *A Comparison of Real Versus Simulated Contraband VOCs for Reliable Detector Dog Training Utilizing SPME-CG-MS*, 40 Am. Lab. 16 (Jan. 2008). Methyl benzoate is present in many legal substances. Lewis R. Katz and Aaron P. Golembiewski, *Curbing the Dog: Extending the Protections of the Fourth Amendment to Police Drug Dogs*, 85 Neb. L. Rev. 735, 755 (2007). Similarly, dogs typically alert to heroin by detecting acetic acid, a common substance used in pickles and certain glues; and to MDMA, or ecstasy, by detecting piperonal, which is found in flavorings, perfume, and mosquito repellant. *Id.*; see also *Florida v. Jardines*, No. 11-564, Amicus Brief of National Association of Criminal Defense Lawyers at 12-15. Dogs trained for methamphetamine alert by detecting chemicals in amphetamine, which is the active ingredient in

lawful drugs commonly used to treat Attention Deficit/Hyperactivity Disorder. Leslie A. Lunney, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*, 88 Or. L. Rev. 829, 874 n.214 (2009).<sup>12</sup> In at least one case, a dog trained to detect methamphetamine alerted to ephedrine, a legal precursor of methamphetamine sold over the counter in pharmacies. *United States v. Patten*, 183 F.3d 1190, 1195 (10th Cir. 1999).

False alerts also come from handler errors. “Handler cues are conscious or unconscious signals given from the handler that can lead a detection dog to where the handler thinks drugs are located.” *State v. Nguyen*, 811 N.E.2d 1180, 1195 n.107 (Ohio Ct. App. 2004). Courts recognize that handlers may influence their dogs to alert in the absence of the signal odor. For instance, the District of Columbia Circuit noted that “less than scrupulously neutral procedures, which create at least the possibility of unconscious ‘cuing,’ may well jeopardize the reliability of dog sniffs.” *United States v. Trayer*, 898 F.2d 805, 809 (D.C. Cir. 1990). Recently, in *State v. Foster*, 252 P.3d 292 (Or. 2011), the Oregon Supreme Court stated that the dog was tested in a manner that prevented handler cueing. 252 P.2d at 295. The issue of cueing has led Professor Myers to recommend that

---

<sup>12</sup> For a more thorough discussion of the science underlying canine narcotics detection training and performance, see Amicus Brief of Fourth Amendment Scholars in *Jardines*, No. 11-564, at 18-32.

dog sniffs be videotaped “to ensure that the result is reliable and not a reaction to cuing from a handler.” Richard E. Myers II, *In the Wake of Caballes, Should We Let Sniffing Dogs Lie?*, 20 Crim. Just. 4 (Winter 2006), at 8-9, 13.

A recent University of California-Davis study involving 18 handler-dog teams deepens concern about cueing and misinterpretation. See Lisa Lit, et al., *Handler beliefs affect scent detection dog outcomes*, Anim. Cogn. (2011) 14:387-394.<sup>13</sup> All the teams were from law enforcement agencies and all were certified to detect narcotics, explosives, or both. Handlers were influenced to believe that scents were located at specific markers when, in fact, none of the locations had any of the scents that should have triggered a canine alert. *Id.* at 389. The researchers sought to determine whether the effects of human belief on the behavior of trained animals, known as the “Clever Hans” effect. *Id.* at 387-88. Many false alerts occurred, particularly to locations marked by human suggestion such as a paper marker than to locations with items such as a tennis ball or hidden sausage that increased dog interest. The authors attributed the results to either of two possible explanations: handler belief that the scent was present cued the dogs to alert, or handlers called alerts at locations they believed contained the target scent.

---

<sup>13</sup> Available at <http://www.springerlink.com/content/j477277481125291/fulltext.pdf?MUD=MP>.

Indeed, three handlers admitted they overly cued their dogs at marked locations. *Id.* at 392.

Handler misinterpretation of a dog's signals has been identified as the source of "almost all erroneous alerts." Bird, 85 Ky. L. J. at 422. In *United States v. Outlaw*, 134 F. Supp. 2d 807 (W.D. Tex. 2001), *aff'd*, 319 F.3d 701 (5th Cir. 2003), the court observed that "a canine alert is not always an objectively verifiable event. In some instances, an alert is simply an interpretation of a change in the dog's behavior by a human handler." A possible example of misinterpretation is *United States v. Heir*, 107 F. Supp. 2d 1088 (D. Neb. 2000), in which the dog's handler identified the alert as "subtle" and recognizable only to someone familiar with the dog. Defense experts saw no evidence of an alert on the videotape. The court suppressed the evidence seized in the search that followed the alert, concluding that "there must be an objectively observable 'indication' by the dog of the presence of drugs." *Id.* at 1091.

**E. Field performance recordkeeping is standard for drug-detector dogs and is often considered by courts.**

The dog in *Doe v. Renfrow* alerted to approximately 50 students, but only 17 students were found in possession of drugs and two were found in possession of drug paraphernalia. 475 F. Supp. at 1017. Of 28 dog alerts during the roadblock in *Merrett v. Moore*, only one drug arrest resulted. 58 F.3d at 1547.

Had Aldo been the source of the alerts in those operations, the State would deem his questionable performance irrelevant to the reasonableness determination in this case. Its position is undermined by the pervasiveness of field performance record keeping in canine drug detection and the consideration already given field performance in case law.

Law enforcement agencies already generate, maintain, and disclose field performance data. Documentation of deployments, alerts, and the fruits, if any, of the ensuing searches is a matter of filling out a form, a process familiar to all government workers and especially law enforcement officers. See *United States v. Prokupek*, 2009 WL 2634446 (D. Neb. 2009), *rev'd*, 632 F.3d 460 (8th Cir. 2011) (noting that deployment form is completed after each deployment of dog); *United States v. Beltran-Palafox*, 731 F. Supp. 2d 1126, 1137 (D. Kan. 2010) (canine officer testified that he learned through a police dog association to keep records during testing and field work to document when dog was deployed, “the circumstances and location of the search, how the canine behaved, and whether anything was found”); *State v. Howard*, 803 N.W.2d 450, 465 (Neb. 2011) (officer testified that form indicating whether dog alerted and whether drugs were found is completed for every deployment); *United States v. Gregory*, 302 F.3d 805, 811 (8th Cir. 2002) (handler kept records of performance of dog in on-going training and actual drug detection kept and regularly submitted records to state police).



It is not surprising that law enforcement agencies commonly make and keep these records, in that detector dog organizations call for field performance recordkeeping. SC8-5.1, Approved Guidelines for Substance Dogs: Narcotics, Scientific Working Group on Dog and Orthogonal Detector Guidelines (SWGDOG);<sup>14</sup> Draft Best Practice Guidelines for Detector Dog Teams, International Forensic Research Institute/National Forensic Science Technology Center (IFRI/NFSTC).<sup>15</sup> One certification organization has explained that deployment records will reveal problems in performance that can be corrected. American Police Canine Association, *Your Records Will Matter*, <http://www.theapca.com/content.php?page=legal>. Those who train and certify dogs for a living know that a dog's reliability can change over time, making essential the regular monitoring and documentation of the dog's field performance through deployment record keeping.<sup>16</sup>

---

<sup>14</sup> Available at <http://www.swgdog.org>.

<sup>15</sup> Available at <http://www2.fiu.edu/~ifri/detector%20dogs/DRAFT%20Detector%20Dog%20Best%20Practices%205%2023%202003.pdf>.

<sup>16</sup> Commentators have long called for field performance record keeping. See Wayne R. LaFare, 1 *Search and Seizure: A Treatise on the Fourth Amendment* § 2.2(g), at 537 n.357 (4th ed. 2004) (stating that "[o]nly after this information has been furnished is a magistrate justified in issuing a warrant"); Bird, *supra*, 85 Ky. L. J. at 425 (characterizing dog's accuracy rate as an "easily obtained indicator of reliability" and data thereon as "readily presentable in the courtroom"); Myers, *supra*, 14 Geo. Mason L. Rev. at 33 ("At the very least, the courts should  
(Continued on following page)

Because these records are widely available, courts already consider them. Perhaps one of the first to do so was the district court in *United States v. Florez*, 871 F. Supp. 1411 (D.N.M. 1994), which stated that where records are kept, including documentation of field alerts, “the dog’s reliability could be sufficiently established through the records themselves or through the dog’s trainer who maintained the records.” *Id.* at 1424. Although they have not required evidence of field performance to establish drug-detector dog reliability, at least seven federal circuit courts have signaled willingness to factor field performance into the reliability determination. See *United States v. Christian*, 452 Fed. Appx. 283, 285 (4th Cir. 2011) (determination that currently certified detection dog that had at most 3 false alerts in 183 deployments during year not clearly erroneous); *United States v. Stubblefield*, 682 F.3d 502 (6th Cir. 2012) (probable cause finding based in part on discovery of drugs 90 percent of the time certified dog alerted not clear error); *United States v. Limares*, 269 F.3d 794, 798 (7th Cir. 2001) (omission of evidence that dog’s alerts to packages led to discovery of drugs 62 percent of the time and currency 31 percent of the time not fatal to warrant based on alert); *United States v. Bowman*,

---

mandate the collection of data on the use of the dogs and their accuracy rates in the field”); Max A. Hanson, *Comment*, *United States v. Solis*, 13 San Diego L. Rev. 410, 416-17 (stating that probable cause based on dog’s alert depends on factors including “track record” up until search, with emphasis on false alerts or mistakes).



660 F.3d 338, 345 (8th Cir. 2011) (noting dog that was recertified annually and did not have “significant history of false alerts” presented no basis to conclude that dog was inherently unreliable and its alert did not provide probable cause to search car); *United States v. Perez-Almonte*, 2012 WL 2109397 (9th Cir. 2012) (not clearly erroneous to find dog reliable when handler testified to its field performance, which included failure of only five percent of alerts to result in recovery of drugs); *United States v. Ruiz*, 664 F.3d 833, 841 (10th Cir. 2012) (probable cause not undermined by state-certified dog’s 70 percent reliability rate in past ten drug sniffs); *United States v. Smith*, 448 Fed. Appx. 936, 939 (11th Cir. 2011) (considering certified dog’s alleged 70 percent accuracy rate in the field in rejecting claim that trial court clearly erred in concluding that alert supplied probable cause for search of car).

The First Circuit, responding to a challenge to a search warrant based in part on the affidavit’s failure to disclose the dog’s success and error rate, recognized that “[t]he reasonableness of relying on the behavior of a police dog depends on what one knows about the dog and the person who handles it, . . . and the police can provide this sort of information in a readily available résumé of general certification standards and particular performance statistics, dog by dog, to be attached to a warrant application on a moment’s notice.” *United States v. Grupee*, 682 F.3d 143, 147 (1st Cir. 2012).

The Supreme Courts of Nebraska, Oregon, South Dakota, and Tennessee, in addition to Florida, have relied on field accuracy rates in assessing drug-sniff dog reliability. In 2000, the Supreme Court of Tennessee stated that “the trial court, in making the reliability determination, may consider such factors as: the canine’s training and the canine’s ‘track record,’ with emphasis on the amount of false negatives and false positives the dog has furnished” and “should also consider the officer’s training and experience with this particular canine.” *State v. England*, 19 S.W.3d 762, 768 (Tenn. 2000). Seven years later, the South Dakota Supreme Court concluded that “trial courts making drug dog reliability determinations may consider a variety of elements, including such matters as the dog’s training and certification, its successes and failures in the field, and the experience and training of the officer handling the dog.” *State v. Nguyen*, 726 N.W.2d 871, 877 (S.D. 2007).

In 2011, the supreme courts of two states joined the Florida Supreme Court in recognizing the relevance of field-performance evidence. Noting that many courts consider training and certification the only evidence relevant to a canine reliability determination, the Nebraska Supreme Court opted for a different rule better attuned to the “totality of the circumstances” standard for determining probable cause. *State v. Howard*, 803 N.W.2d 450, 465 (Neb. 2011). It joined jurisdictions that “allow a defendant in at least some circumstances to introduce evidence of a drug detection dog’s search records and consider those records in the totality of the circumstances

when determining whether a canine alert, combined with reasonable suspicion factors, amounts to probable cause to search a vehicle.” The court found no error in a lower court determination that an alert was reliable on evidence including field performance records and testimony that the dog and handler had renewed their certification annually. *Id.* In two cases decided the same day, the Oregon Supreme Court relied in part on field performance records as evidence supporting the reliability of one dog but ruled that field records failed to compensate for inadequate evidence of training and certification to establish a different dog’s reliability. *See State v. Foster*, 252 P.3d 292, 301 (Or. 2011); *State v. Helzer*, 252 P.3d 288, 290-91 (Or. 2011).

Even more recently, a Massachusetts trial court, relying in part on *Harris*, issued a detailed order finding a search warrant affidavit constitutionally deficient because “no records of reliability for the drug detection K-9 and his handler were provided by the police.” *Com. v. Santiago*, 2012 WL 2913495 (Mass. Superior Ct. 2012) at \*2. The court also concluded that a statement “that that the dog is certified, by itself, does not demonstrate reliability or basis of knowledge.” *Id.* at 11.

These decisions belie the State’s contention that a probable cause determination that incorporates field-performance evidence upends settled law throughout the nation. State Br. at 34. Instead, courts are moving toward greater recognition that field performance is material to the determination of sniff-dog reliability.

**F. Lapsed certification or certification with a different handler increases the need for evidence of accuracy in real-world settings.**

The potential for cueing and handler misinterpretation is magnified where, as here, handler and dog were not certified together, and the dog's certification expired more than a year before the alert.

Team certification is essential to drug-detector dog reliability. "The relationship between a dog and its handler is the most important element in dog sniffing, providing unlimited opportunities for the handler to influence the dog's behavior." Katz and Golembiewski, 85 Neb. L. Rev. at 762. Communication between handler and dog has been identified as the primary issue in determining the credibility of a dog's alert. *United States v. Howard*, 621 F.3d 433 (6th Cir. 2010).

[T]he dog and handler function as an integral team. The dog is the sensor, and the handler is the trainer and interpreter. The handler's performance in both roles is inseparably intertwined with the dog's overall reliability rate. . . . Each dog develops an individual pattern for communicating an alert, which must be interpreted by the handler, or another familiar with that dog. Otherwise, for example, a reaction to the odor of food, or another animal, might be mistaken for an "alert" to drug odors. . . . [T]he informant is the dog, not the handler. The handler merely interprets the dog's actions.

*United States v. Paulson*, 2 M.J. 326, 330 (A.F.C.M.R. 1976).

Guidelines for national and international certification organizations require certification of dog and handler as a team. SWGDOG Guidelines, SC8 – Substance Detector Dogs (Narcotics Section);<sup>17</sup> United States Police Canine Association, Inc., Rules and Regulations for Certification (2012), General Rules and Definitions Governing Certification of Detector Canines, Rule 4.L., at page 13;<sup>18</sup> *United States v. Howard*, 621 F.3d 433, 454 (6th Cir. 2010) (reflecting certification by National Detector Dog Association, which requires dog and handler to be tested for renewed certification once every 12 months). Certification guidelines for the program jointly administered by the International Forensics Research Institute at Florida International University and the National Forensic Science Technology Center specify that “[c]ertification is for the handler and the dog as a team and if the dog changes handlers then a new certification is required.” IFRI/NFSTC Certification Guidelines.<sup>19</sup>

---

<sup>17</sup> Available at <http://www.swgdog.org>.

<sup>18</sup> Available at [http://www.uspcak9.com/certification/USPCA Rulebook2012.pdf](http://www.uspcak9.com/certification/USPCA_Rulebook2012.pdf).

<sup>19</sup> Available at <http://www2.fiu.edu/~ifri/detector%20dogs/K9%20Certification%20IFRI%20NFSTC%206%202003.pdf>. The IFRI/NFSTC Certification Guidelines specify that the goal of the program, in part, “is to continue to advance scientifically sound detection K-9 validation programs which are internationally

(Continued on following page)



In this case, Aldo was certified in February 2004 as part of a team with Seminole County Deputy Morris. JA 103. This was not the same team that encountered Harris in June 2006 or two months later. In the interim, Aldo had been acquired by Liberty County Officer Wheatley, but the two were not recertified as a team.

If they existed, state standards compelling annual recertification and requiring team certification might have dissuaded the State from relying on an alert by the Aldo/Wheatley team for probable cause until and unless the team met those standards. As Wheatley explained during the suppression hearing, Florida has no certification standard for narcotics detection dogs. JA 71. Florida certifies canine teams, but only for patrol duties and not drug detection. Fla. Admin. Code 11B-27.013. Few states certify drug detection dog teams. South Dakota and Oklahoma are two that do. Like certification organizations, both states certify dog and handler as a team, and certifications in each state expire after a year. S.D. Codified Laws § 23-3-35.4 (2012); Okl. Stat. tit. 70, § 3311 (2012).<sup>20</sup>

---

recognized." According to IFRI/NFSTC, "Annually, more than 100 detection teams from dozens of different agencies across the State of Florida including all of the [Florida Highway Patrol's] narcotic and explosive detection teams have been certified through this program."

<sup>20</sup> Effective July 1, 2012, Illinois law requires that all police dogs used by state and local law enforcement agencies for drug

(Continued on following page)

Nor do state standards exist in Florida for the manner in which drug-detector dogs are trained, increasing the uncertainty for courts and defendants. “If defined standards existed, they would provide a framework upon which the defendant could challenge whether or not the particular detector dog and handler team complied with established procedures and requirements.” Dave Hunter, *Common Scents: Establishing A Presumption of Reliability for Detector Dog Teams Used in Airports in Light of the Current Terrorist Threat*, 28 U. Dayton L. Rev. 89, 98-99 (2002).

Annual recertification is also basic to the reliability of the team. Some jurisdictions have treated current certification as a bare minimum. *See Wood*, 915 F. Supp. at 1126 (“Both Tenth Circuit and Fifth Circuit precedent recognize that a probable cause showing must at a minimum prove that the dog is trained and currently certified.”); *but see United States v. Ludwig*, 641 F.3d 1243, 1251 n.3 (10th Cir. 2011) (stating that uncertified dog’s reliability could, “in theory at least,” be established by its training

---

enforcement meet minimum certification requirements set by the Illinois Law Enforcement Training and Standards Board. 50 Ill. Comp. Stat. 705/10.12 (2012). The Board adopted slightly modified best practice guidelines of SWGDOG, which certifies handler and dog as a team, and specifies that agencies must have dogs recertified within 12 months of the initial training and certification compliance letter. Implementation of Narcotic Detection Canine Minimum Certification Requirements, <http://www.ptb.state.il.us/pdf/Canine/ImplementationofNarcoticDetectionCanine2012.pdf>.



history and record for reliability). A dog's reliability can change over the course of its eight- to nine-year career. Bird, *supra*, 85 Ky. L. J. at 415. The importance of field performance record keeping grows in proportion to the passage of time since certification. See *United States v. Kennedy*, 131 F.3d 1371, 1375 (10th Cir. 1997) ("Accurate record keeping is essential to ensure the dog's reliability until the dog is recertified.").

To reiterate, Aldo's certification with Deputy Morris expired in February 2005. Officer Wheatley searched Harris' truck based on his perception that Aldo alerted to the door handle in June 2006. The long-expired certification with a different handler detracted from probable cause to search Harris' truck. Compare *People v. Stillwell*, 129 Cal. Rptr. 3d 233, 235 (Cal. Ct. App. 2011) (noting, in rejecting challenge to probable cause based on dog alert, that dog was up to date on his certifications, that handler was trained and certified to handle dog, and that handler kept performance records).

**G. A "totality of the circumstances" approach to canine sniff reliability does not substantially burden the courts or the government.**

The prediction that the Florida Supreme Court decision will lead to time-consuming and costly suppression hearings is insupportable. State Br. at 25, U.S. Br. at 25-26. Amicus cites *United States v.*

*Robinson*, 390 F.3d 853 (6th Cir. 2004), which used the term “mini trials.” To some extent, all suppression hearings resemble short trials. Witnesses are questioned, evidence introduced, arguments made. The State must mean something more. The trial and appellate courts in *Robinson* considered evidence that both the dogs and handlers were certified at the time they were used, as well as performance statistics and other documentation. *Id.* at 874. The appellate court used the term “mini trial” in rejecting the defense request for a broader inquiry into the validity of a search warrant resting in part on the dog alerts:

We will not disturb these factual findings on the basis of mere suggestions that the training of drug detection dogs could be refined in various ways to improve the reliability of positive alerts. Indeed, it would be particularly inappropriate to insist that a mini-trial be held on a drug dog’s training and performance before a law enforcement officer could cite a positive alert as a basis for obtaining a warrant. Even if such a hearing might raise some doubt about the reliability of a particular alert, an officer surely is entitled to rely in good faith upon the existence of probable cause as determined by a neutral magistrate, so long as the dog in question has been generally certified as a drug detection dog.

390 F.3d at 874-75 (internal citation omitted). The search in this case was without a warrant.

Here the Florida Supreme Court called on the State to explain “the meaning of the particular training and certification.” 71 So. 3d at 759. The court observed that the weekly training records introduced by the State “reveal that on a performance level of either satisfactory or unsatisfactory, Aldo performed satisfactory[il]ly 100% of the time,” but that “Officer Wheetley did not explain whether a satisfactory performance includes any alerts to vehicles where drugs were not placed.” *Id.* at 760. The court did not open the door to suggestions for inquiry into possible training refinements as sought by the defendant in *Robinson*.

Further, the need for an explanation of the meaning of certification in this case stems from the absence of state standards for drug-detector dog/handler teams and the State’s failure to produce any evidence on the standards that resulted in Aldo’s February 2004 certification with Deputy Morris. Standards for certification by a number of organizations operating in the United States are easily obtained. *See, e.g.*, International Police Working Dog Association Certification Rules, Narcotics Detection;<sup>21</sup> National Narcotic Dog Detector Association – Narcotic Detection Standards;<sup>22</sup> United States Police Canine

---

<sup>21</sup> Available at <http://www.ipwda.org/narcotics.php>.

<sup>22</sup> Available at [http://www.nndda.org/official-docs/doc\\_view/2-narcotics-detection-standard?tmpl=component&format=raw](http://www.nndda.org/official-docs/doc_view/2-narcotics-detection-standard?tmpl=component&format=raw).

Association, Certification Rules and Regulations.<sup>23</sup> Because he did not participate in the 2004 “Drug Beat” testing, Officer Wheatley could not explain the criteria for Aldo’s certification. JA 53-55, 70-71.

The State wrongly asserts that the Florida Supreme Court required the State to introduce evidence of the dog’s alert to residual odors. State Br. at 25. The court merely gave the State “the opportunity to present evidence explaining the significance of any unverified alerts, as well as the dog’s ability to detect or distinguish residual odors.” 71 So.3d at 771. In sum, to satisfy the totality-of-the-circumstances test, the evidence produced at the suppression hearing need not go beyond information on success and failures in training, including false alerts; current certification status, including the standards for certification; and field performance records, with an option for the State to explain unverified alerts as residual-odor alerts.

Providing this documentation could well lead to fewer suppression hearings. Defendants will be unlikely to seek suppression of evidence seized in a search following a dog alert if they receive information on the dog’s success rate in training, the criteria used for certification, and field performance records which demonstrate that the dog is reliable.

---

<sup>23</sup> Available at [http://www.uspcak9.com/certification/USPCA Rulebook2012.pdf](http://www.uspcak9.com/certification/USPCA_Rulebook2012.pdf).

Further, a dog alert that is too unreliable on its own to justify a search can be combined with other evidence to create probable cause. *See State v. Howard*, 24 P.3d 44, 48 (Idaho 2001) (although affidavit did not establish dog's reliability, other facts in affidavit were sufficient to allow consideration of dog's alert as factor in determining probable cause). Weak reliability makes the probative value of the alert proportionately weak. *See, e.g., United States v. \$67,220.00 in U.S. Currency*, 957 F.2d 280, 285-86 (6th Cir. 1992) (discounting probative value of dog alert because government's evidence on reliability and on existence of alert were weak). An alert by an unreliable dog is merely "another element to be considered" under the *Gates* test, comparable to a dog's failure to alert. *See United States v. Jodoin*, 672 F.2d 232, 234-36 (1st Cir. 1982).

Finally, in jurisdictions that now require nothing more than evidence of training or certification to establish that a drug-detector dog is reliable, police agencies that relied on controlling precedent need not suffer suppression if this Court authorizes a broader inquiry. "Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011).<sup>24</sup>

---

<sup>24</sup> Florida had no binding precedent at the time of the search in this case. Two of the five appellate districts required the state to present field performance records. *Matheson v. State*, 870 So 2d 8 (Fla. 2d DCA 2003); *State v. Foster*, 390 So. 2d (Continued on following page)



**H. Requiring the State to produce field performance records is logical, reasonable, and workable.**

Law enforcement agencies own, train, and deploy the drug-detector dogs whose alerts they use to justify warrantless searches and trigger criminal prosecutions. The agency responsible for the care and use of the dog, and the government served by that agency, are the only entities capable of generating and maintaining deployment records. As stated in *Cooper v. Oklahoma*, 517 U.S. 348 (1996), in which the Court ruled unconstitutional a statute presuming a defendant competent for trial unless he proves incompetence, “the difficulty of ascertaining where the truth lies may make it appropriate to place the burden of proof on the proponent of an issue.” *Id.* at 366; *cf. Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 626 (1993) (finding under the common law that where a party is more likely to have information on facts about its withdrawal from a pension plan, it is “entirely sensible” to burden that party with the obligation to demonstrate that facts amounting to a withdrawal did not occur as alleged).

---

469 (Fla. 3d DCA 1980). Two others allowed the defense to present field performance evidence to rebut a showing of reliability from other evidence. *State v. Laveroni*, 910 So. 2d 333 (Fla. 4th DCA 2005); *State v. Coleman*, 911 So 2d 259 (Fla. 5th DCA 2005). The issue had not been addressed in the First District, where this case arose.

Not only is the government the only party to a criminal prosecution that can generate and maintain the documentation of its use of detector dogs; it is also “has the burden of proving the lawfulness of the search.” *United States v. Maple*, 348 F.3d 260, 262 (D.C. Cir. 2003), citing *Mincey v. Arizona*, 437 U.S. 385, 390-91 (1978). Florida follows the federal courts and most states in assigning the burden of proving a valid warrantless search to the prosecution when a timely objection is raised. *Harris*, 71 So. 3d at 766; LaFave, 6 *Search and Seizure* § 11.2(b), at 42 (4th ed. 2004). If, as has been demonstrated, field performance records are relevant evidence that courts consider in making probable-cause determinations, the only workable system for ensuring access to these records is to make their presentation part of the state’s burden of proof.

Several courts have concluded that the prosecution can make a prima facie showing of reliability by introducing evidence that the dog was trained and certified, which the defense is free to rebut with a poor performance history. See, e.g., *United States v. Wood*, 915 F. Supp. 1126, 1134-35 (D. Kan. 1996), *rev’d on other grounds*, 106 F.3d 942 (10th Cir. 1997); *Dawson v. State*, 518 S.E.2d 477, 480 (1999).<sup>25</sup> This apportionment

---

<sup>25</sup> This was the approach in two Florida appellate decisions disapproved in *Harris* because they did not make presentation of evidence of field-performance part of the state’s burden. See

(Continued on following page)



of the burden rests on an assumption that field-performance records are available to the defense. However, the court in *Wood* ruled that the defense has no right to obtain performance records absent circumstances “requiring a more detailed inquiry” than can be provided by records of training and certification. 915 F. Supp. at 1136-37; *see also State v. Nguyen*, 811 N.E.2d 1180, 1194 (Ohio Ct. App. 2004) (reversing trial court order requiring state to produce “real-world reports” for narcotics detection dog), *but see United States v. McGlothlen*, 2008 WL 4533971 (D. Neb. 2008) (granting discovery of canine deployment forms). Likewise, the federal circuit courts that have addressed the issue have declined to require discovery of performance records if the state shows that the dog was trained and currently certified. *See United States v. Cedano-Arellano*, 332 F.3d 568, 570 (9th Cir. 2003); *United States v. Gonzalez-Acosta*, 989 F.2d 384, 389 (10th Cir. 1993). This case demonstrates that without an affirmative obligation to present performance history upon a timely request, the State may opt not to generate or maintain the records.

The Florida Supreme Court’s rule in this case works. Lower courts applying *Harris* have looked to the reviewing magistrate’s ability to evaluate the dog’s performance history without focusing on which party presented the evidence. *Blalock v. State*, 37 Fla.

---

*State v. Laveroni*, 910 So. 2d 333, 335 (Fla. 4th DCA 2005); *Coleman*, 911 So. 2d 255, 261 (Fla. 5th DCA 2005).

L. Weekly D1719 (Fla. 1st DCA July 19, 2012); *Joe v. State*, 73 So. 3d 791, 793 (Fla. 5th DCA 2011), *rev. denied*, 2012 WL 1997091 (Fla. May 31, 2012).<sup>26</sup> In another case, the state presented field performance records showing that 14 alerts yielded contraband in only 4 instances, which the court ruled insufficient to establish the dog's reliability, even when some of the unverified alerts were attributed to residual odors. *Wiggs v. State*, 72 So. 3d 154, 159-60 (Fla. 2d DCA 2011).

A concurring judge shared four concerns in *Wiggs*. First, he believed the Florida Supreme Court decision in this case would not allow a court to combine an alert by a dog with a poor performance record with other facts to find probable cause. *Id.* at 160 (Altenbernd, J., concurring specially). The Florida Supreme Court did not so state in this case, and its decision does not foreclose probable cause when an alert by an unreliable dog is combined with other evidence. Second, the concurring judge in *Wiggs* cautioned that if dogs cannot be trained to distinguish between "residual drugs" and "larger quantities," "it seems we will need to abandon dogs as a method of obtaining probable cause for that drug." Precedent cited and approved below suggests that

---

<sup>26</sup> The alerts and searches in *Blalock* and *Joe* occurred before the Florida Supreme Court's April 21, 2011, decision in *Harris*. Although not then required by the law of the appellate districts in which the cases arose, in each case the state kept and disclosed field performance records.

such training is feasible. *Matheson*, 870 So. 2d at 14, quoting *Bird*, *supra*, 85, Ky. L.J. at 410-11. However, even if the state establishes that a dog could not be trained or was not trained to disregard residual odors, the trial court can opt to exclude a proven residual-odor alert from the reliability determination, as either a hit or a miss. The handler in this case kept no field performance records showing alerts that did not yield contraband, leaving only evidence of two residual odor alerts: the one resulting in Harris' conviction and another several months later that yielded no evidence of drug activity whatsoever. 71 So. 3d at 774.

Third, the *Wiggs* concurrence laments using the exclusionary rule to enforce best practices rather than a minimum standard. *Wiggs*, 72 So. 3d at 161. However, as demonstrated above, keeping performance logs is standard for many law enforcement agencies and certification organizations. Because no performance records were available here, this case does not create an opportunity to establish a minimum level of field proficiency. The bearing of field performance on probable cause will continue to develop in precedent. Further, dogs are certified based on proficiency numbers. That field proficiency is also quantifiable does not justify its exclusion from the circumstances contributing to a probable-cause determination.

Finally, the concurring judge in *Wiggs* expressed the hope that if the dog in this case "were sniffing for explosives at the entrance to an international airport,

he would surely hope that a 36 percent accuracy rate would support a search.” 71 So. 3d at 161. Presumably it would. As Justice Ginsburg has cautioned, the “special needs” doctrine may yield a different standard when public safety is at issue. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000) (use of highway checkpoint designed to uncover evidence of “ordinary criminal wrongdoing” in the form of narcotics possession contravenes Fourth Amendment); *Caballes*, 543 U.S. 405, 423-25 (Ginsburg, J., dissenting) (emphasizing that dog sniff for explosives is “an entirely different matter” from a sniff for drugs, and would likely be justified under the special needs doctrine).

Despite these concerns, the concurring judge in *Wiggs* acknowledged that “the logic of *Harris* and this court’s earlier decision in *Matheson* (approved in *Harris*) cannot be denied.” *Id.* at 161.

- I. The facts known to the officer did not reasonably justify a belief that drugs or other evidence of criminal activity would be found in the truck after the dog alerted to the driver’s door handle.**

Several holes in the State’s case for reliability of the Aldo/Wheetley team left the evidence insufficient to establish probable cause from the alert to Harris’ truck. First, there was no evidence whether Aldo’s January 2004 training simulated different environments and distractions and whether the trainer knew where drugs were hidden. Second, the State presented

no evidence on the testing criteria for the February 2004 Drug Beat certification. Third, there was no testimony whether Aldo's weekly training with Wheetley included any false alerts. Fourth, the State presented no evidence of field performance records or testimony on unverified alerts in the field. Fifth, the State failed to explain why a residual-odor alert to the door handle created probable cause to believe drugs were in the vehicle. This is crucial because any drug user desperate for money or sellable items can rapidly check for unlocked vehicles parked at malls, shopping centers, driveways, or the street. Finally, Harris' expired tag, open beer can, shaking, rapid breathing, and inability to sit still failed to add appreciably to suspicion of criminal activity involving drugs.

The State and its amici would pare from the reliability analysis all but the evidence in its favor. State Br. at 16; Va. Br. at 6; U.S. Br. at 10; USPCA Br. at 4. In its formulation of the Question Presented, the United States would go further and limit the criterion to a single question: was the dog a "trained drug-detection dog." U.S. Br. at (1). This replaces the totality-of-the-circumstances test with a label.

Their approach has the benefit of creating a bright line, but it is a line that erases the Fourth Amendment requirement of probable cause based on the totality of the circumstances on a case-by-case basis. This Court, recognizing the "'endless variation in the facts and circumstances' implicating the Fourth Amendment," has "consistently eschewed



bright-line rules” and “disavowed any ‘litmus-paper test,’ or a single ‘sentence or . . . paragraph . . . rule.’” *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (quoting *Florida v. Royer*, 460 U.S. 491 (1983)). This Court recognized in *Gates* that rigid rules – such as limiting the inquiry into the reliability of a dog that has alerted to a vehicle to evidence of training and certification – are anathema to the case-by-case determination of probable cause.

Further, the costs of reliance on inaccurate drug-detector dogs are high: time-consuming searches of the vehicles of innocent motorists, and diversion of law enforcement resources into fruitless pursuits. As shown above, even a highly accurate dog will prompt searches of many innocent persons in addition to those who possess drugs. The Petitioner’s bright line comes at too high a cost.

The decision below draws the correct balance between law enforcement interests and the Fourth Amendment protection against unreasonable searches and seizures, one which uses the exclusionary rule to limit intrusions into reasonable expectations of privacy while preserving the use of demonstrably reliable dogs in drug interdiction.

---



## CONCLUSION

Under this Court's precedents, a motorist may be stopped for any moving violation and a drug-detector dog may be deployed around the vehicle. If the dog alerts, the officer may search the vehicle for drugs – if the dog is reliable. The State wishes to create a bright line that does not consider the totality of the circumstances. Evidence that a dog has been trained, currently certified, or both can go part of the way toward demonstrating that probable cause exists, making the search reasonable. However, even with some training, dogs sometimes alert where no drugs are found, whether because of residual odors, scent confusion, or handler error. The consequences of a false alert are a substantial and sometimes humiliating invasion of a motorist's privacy. Therefore, courts assessing whether the totality of the circumstances creates probable cause for a warrantless vehicle search based on a canine alert must be allowed to learn the dog's track record, if any, in comparable situations. The Florida Supreme Court is one of several courts that has so held. Lower courts applying the decision have found it workable, and many police agencies already generate and maintain the records.

Respondent requests that this Court affirm the Florida Supreme Court decision requiring field performance evidence in addition to other indicia of reliability and reversing the denial of suppression in

this case on facts that include the absence of evidence of the dog's record of unverified field alerts.

Respectfully submitted,

NANCY A. DANIELS  
Public Defender  
SECOND JUDICIAL CIRCUIT  
OF FLORIDA

GLEN P. GIFFORD  
Assistant Public Defender  
301 S. Monroe St., Suite 401  
Tallahassee, FL 32301  
(850) 606-8500  
glen.gifford@flpd2.com  
*Counsel of Record*  
*Attorneys for Respondent*

# **REPLY BRIEF**

**In the  
Supreme Court of the United States**

---

STATE OF FLORIDA,

*Petitioner,*

v.

CLAYTON HARRIS,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF FLORIDA

---

**REPLY BRIEF FOR PETITIONER**

---

GREGORY G. GARRE

*Counsel of Record*

BRIAN D. SCHMALZBACH

*Special Assistant*

*Attorneys General*

LATHAM & WATKINS LLP

555 Eleventh Street, NW

Suite 1000

Washington, DC 20004

(202) 637-2207

gregory.garre@lw.com

PAMELA JO BONDI

*Attorney General of*

*Florida*

CAROLYN M. SNURKOWSKI

*Associate Deputy*

*Attorney General*

ROBERT J. KRAUSS

*Chief-Assistant*

*Attorney General*

SUSAN M. SHANAHAN

*Assistant Attorney General*

OFFICE OF THE ATTORNEY

GENERAL

3507 E. Frontage Road

Suite 200

Tampa, FL 33607-7013

*Counsel for Petitioner*

---

## TABLE OF CONTENTS

|                                                                                                                 | Page |
|-----------------------------------------------------------------------------------------------------------------|------|
| INTRODUCTION .....                                                                                              | 1    |
| ARGUMENT .....                                                                                                  | 2    |
| A. Respondent's Position Rests On A<br>Misguided Conception Of Probable<br>Cause .....                          | 2    |
| B. Respondent's Attempts To Impugn<br>The Reliability Of Trained Drug-<br>Detection Dogs Are Unfounded .....    | 7    |
| C. Respondent's Efforts To Defend The<br>Florida Supreme Court's Extreme<br>Evidentiary Requirements Fail ..... | 12   |
| D. The Record Amply Supports Officer<br>Wheetley's Decision To Search The<br>Vehicle .....                      | 17   |
| CONCLUSION .....                                                                                                | 21   |

## TABLE OF AUTHORITIES

Page(s)

## CASES

|                                                                                                                    |               |
|--------------------------------------------------------------------------------------------------------------------|---------------|
| <i>Atwater v. City of Lago Vista</i> ,<br>532 U.S. 318 (2001) .....                                                | 1             |
| <i>Commonwealth v. Santiago</i> ,<br>30 Mass. L. Rptr. 81, 2012 WL 2913495<br>(Mass. Super. Ct. May 22, 2012)..... | 14            |
| <i>ebay, Inc. v. MercExchange, L.L.C.</i> ,<br>547 U.S. 388 (2006) .....                                           | 8             |
| <i>Franks v. Delaware</i> ,<br>438 U.S. 154 (1978) .....                                                           | 11            |
| <i>Illinois v. Caballes</i> ,<br>543 U.S. 405 (2005) .....                                                         | 10            |
| <i>Illinois v. Gates</i> ,<br>462 U.S. 213 (1983) .....                                                            | <i>passim</i> |
| <i>Johnson v. United States</i> ,<br>333 U.S. 10 (1948) .....                                                      | 7             |
| <i>Maryland v. Cabral</i> ,<br>859 A.2d 285 (Md. Ct. Spec. App. 2004) .....                                        | 6             |
| <i>Maryland v. Pringle</i> ,<br>540 U.S. 366 (2003) .....                                                          | 4             |



## TABLE OF AUTHORITIES—Continued

|                                                                     | Page(s) |
|---------------------------------------------------------------------|---------|
| <i>McCray v. Illinois</i> ,<br>386 U.S. 300 (1967) .....            | 4, 5    |
| <i>Merrett v. Moore</i> ,<br>58 F.3d 1547 (11th Cir. 1995) .....    | 3       |
| <i>Nebraska v. Howard</i> ,<br>803 N.W.2d 450 (Neb. 2011) .....     | 14      |
| <i>N.Y. Trust Co. v. Eisner</i> ,<br>256 U.S. 345, 349 (1921) ..... | 8       |
| <i>Oregon v. Foster</i> ,<br>252 P.3d 292 (Or. 2011) .....          | 14, 16  |
| <i>Oregon v. Helzer</i> ,<br>252 P.3d 288 (Or. 2011) .....          | 15      |
| <i>Pennsylvania v. Dunlap</i> ,<br>555 U.S. 964 (2008) .....        | 19      |
| <i>Taylor v. United States</i> ,<br>286 U.S. 1 (1932) .....         | 7       |
| <i>Texas v. Brown</i> ,<br>460 U.S. 730 (1983) .....                | 2, 4    |
| <i>United States v. Arvizu</i> ,<br>534 U.S. 266 (2002) .....       | 19      |

## TABLE OF AUTHORITIES—Continued

|                                                                                                                     | Page(s)   |
|---------------------------------------------------------------------------------------------------------------------|-----------|
| <i>United States v. Barry</i> ,<br>394 F.3d 1070 (8th Cir. 2005) .....                                              | 19        |
| <i>United States v. Diaz</i> ,<br>25 F.3d 392 (6th Cir. 1994) .....                                                 | 12        |
| <i>United States v. Doyle</i> ,<br>650 F.3d 460 (4th Cir. 2011) .....                                               | 5         |
| <i>United States v. Johns</i> ,<br>469 U.S. 478 (1985) .....                                                        | 7         |
| <i>United States v. Ludwig</i> ,<br>641 F.3d 1243 (10th Cir.), <i>cert. denied</i> , 132 S.<br>Ct. 306 (2011) ..... | 4, 12, 13 |
| <i>United States v. Ruiz</i> ,<br>664 F.3d 833 (10th Cir. 2012) .....                                               | 13        |
| <i>United States v. Trayer</i> ,<br>898 F.2d 805 (D.C. Cir. 1990) .....                                             | 11        |
| <i>United States v. Ventresca</i> ,<br>380 U.S. 102 (1965) .....                                                    | 5, 7      |

## CONSTITUTIONAL PROVISIONS

|                             |               |
|-----------------------------|---------------|
| U.S. Const. amend. IV ..... | <i>passim</i> |
|-----------------------------|---------------|

## TABLE OF AUTHORITIES—Continued

Page(s)

## OTHER AUTHORITIES

|                                                                                                                                                                                                                                                                                                                       |    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Kenneth G. Furton et al., <i>Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction-Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency</i> , 40 J. Chromatographic Sci. 147 (2002) .....                                               | 10 |
| Lisa Lit et al., <i>Handler Beliefs Affect Scent Detection Dog Outcomes</i> , 14 Animal Cognition 387 (2011).....                                                                                                                                                                                                     | 12 |
| Michael S. Macias et al., <i>A Comparison of Real Versus Simulated Contraband VOCs for Reliable Detector Dog Training Utilizing SPME-CG-MS</i> , 40 Am. Lab. 16 (2008) .....                                                                                                                                          | 10 |
| Richard E. Myers II, <i>Detector Dogs and Probable Cause</i> , 14 Geo. Mason L. Rev. 1 (2006).....                                                                                                                                                                                                                    | 19 |
| SWGDOG, <i>SWGDOG Membership Commentary on "Handler beliefs affect scent detection dog outcomes" by L. Lit, J.B. Schweitzer and A.M. Oberbauer</i> , Mar. 31, 2011, <a href="http://casgroup.fiu.edu/SWGDOG/news.php?id=2126">http://casgroup.fiu.edu/SWGDOG/news.php?id=2126</a> (last visited Sept. 19, 2012) ..... | 12 |

## INTRODUCTION

The parties agree that an alert by a drug-detection dog establishes probable cause to search a vehicle if the dog is reliable. Resp. Br. 60. The disagreement is over what is required to establish reliability. As the State has explained, the reliability of a drug-detection dog may be established in any number of ways. Pet. Br. 22. But as lower courts have widely recognized, the fact that a dog has completed a bona fide training program—and thus performed successfully in a controlled setting in which the accuracy of alerts may be definitively assessed—is a sufficient measure of reliability to support a finding of probable cause under this Court’s precedents. *Id.* at 19–24 & n.3. That rule ensures a meaningful opportunity to gauge the reliability of a dog like Aldo—who has successfully completed extensive and continuous training—but also provides the officer in the field with a “clear and simple” baseline that can “be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.” *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001).

In stark contrast, respondent urges this Court to transform virtually every alert into an opportunity for defendants to put K-9 dogs on trial. Respondent vigorously defends the Florida Supreme Court’s rule that the State’s burden in establishing reliability—in every case—consists of presenting evidence of (1) training and certification records; (2) an explanation of the meaning of the dog’s training and certification; (3) field performance records including any unverified alerts; (4) the experience and training of the canine officer; and (5) any other objective evidence about the

dog's reliability known to that officer. Pet. App A48. Indeed, respondent now goes even *further* than the Florida Supreme Court and also demands evidence that (6) the dog has been recertified on an annual basis; (7) the dog and officer have been certified as a unit; and (8) the training regimen included an array of different simulated environments. Resp. Br. 43-47, 57.

Respondent's position has no foundation in the "practical, common-sense" conception of probable cause established by this Court's precedents. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). It is profoundly out of step with the undisputed facts that dogs both have an extraordinary sense of smell and have served as a trusted partner in law enforcement and related activities for centuries. Pet. Br. 16-19. And, if adopted, it would have serious adverse consequences for vitally important law enforcement practices nationwide. The Court should reverse the judgment below, reject the Florida Supreme Court's extraordinary evidentiary requirements, and hold that an alert by a well-trained detection dog like Aldo establishes probable cause.

## ARGUMENT

### A. Respondent's Position Rests On A Misguided Conception Of Probable Cause

1. As the State has explained (Pet. Br. 11-15), probable cause is "a flexible, common-sense standard" that "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' that contraband or evidence of a crime is present. *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality) (citation omitted). The focus is on "probabilities," not "hard certainties." *Id.* (citation

omitted). All that is required is a “fair probability,” *Gates*, 462 U.S. at 246, or a “substantial chance,” *id.* at 243 n.13, that a search will reveal contraband.

Although respondent acknowledges (at 17) that a “fair probability” is enough to establish probable cause, he argues that a “numerical expression of pertinent information enhances . . . the probable cause determination,” Resp. Br. 32 (emphasis added), and then suggests that probable cause requires something approaching statistical infallibility. For example, respondent suggests (at 14) that even a .900 batting average would be problematic because, if “10 percent of motorists subjected to a dog sniff possess drugs,” “[f]or every 100 cars sniffed” a dog will “falsely” alert to “9 of the remaining 90 innocent motorists.” Likewise, respondent points to a Florida narcotics-detection operation in which dogs alerted to 28 out of approximately 1450 vehicles that were sniffed, leading to one arrest. *Id.* at 15, 36 (relying on operation discussed in *Merrett v. Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995)). Without even considering the possibility that officers missed hidden contraband or that dogs alerted to residual odors of contraband, this example at most shows a “false” alert rate under 2%.<sup>1</sup>

---

<sup>1</sup> Respondent’s amici likewise find it “alarming” that certain studies concluded that canine units had accuracy rates of 92%, 71%, and between 62–93%. See, e.g., Rutherford Br. 10 (citing cases). Even accepting the accuracy of such studies (by no means a sound assumption), they hardly support respondent’s claim that dog alerts are inherently *unreliable*. Respondent and his amici also rely on a newspaper article that reported that 44% of dog alerts over a three-year period in suburban Chicago to vehicles resulted in recoverable quantities of drugs. Resp. Br. 29 (citing



This Court has already rejected the “effort to fix some general, numerically precise degree of certainty corresponding to ‘probable cause.’” *Gates*, 462 U.S. at 235; *see also Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (“The probable-cause standard is incapable of precise definition or quantification into percentages . . . .”) (emphasis added). And the level of certainty demanded by respondent and his amici is wildly out of step with this Court’s precedent, which make clear that “[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the [probable cause] decision.” *Pringle*, 540 U.S. at 371 (quoting *Gates*, 462 U.S. at 235) (final alteration in original). Instead, as noted, a “fair probability,” *Gates*, 462 U.S. at 246, or a “substantial chance,” *id.* at 243 n.13, is sufficient. That benchmark does not even demand that an officer’s belief that contraband or evidence of a crime may be present be “more likely true than false.” *Brown*, 460 U.S. at 742; *see also United States v. Ludwig*, 641 F.3d 1243, 1251–52 (10th Cir.) (discussing flaws with transforming probable cause into a “mathematical equation”), *cert. denied*, 132 S. Ct. 306 (2011).

*McCray v. Illinois*, 386 U.S. 300, 304 (1967), relied upon by respondent (at 32), is not to the contrary. There, the Court found probable cause where the officer had known the informant for “roughly two years,” the informant had given narcotics tips “20 or 25 times,” and the tips resulted in an unspecified number

---

article). The article, however, does not describe the methodology or data base used to arrive at that figure in any detail. Nor does the figure account for the possibility that dogs alerted to residual odors, hidden contraband, or unrecoverable quantities of drugs.

of convictions. *Id.* at 304, 313. In other words, there was probable cause notwithstanding the near total lack of information about the informant's hits and misses.

2. Respondent argues (at 7) that the State's position is inconsistent with the requirement that probable cause be assessed in light of the "totality of the circumstances." Not so. The "totality-of-the-circumstances analysis" was adopted to ensure that the probable-cause determination was conducted in a "practical, common-sense" manner—simply calling on a court or magistrate to take account of "all the circumstances" that an officer faced when he made the decision to search. *Gates*, 462 U.S. at 238. The totality-of-the-circumstances analysis was never intended to be a sword for defendants, allowing defendants seeking suppression to zero in on any particular circumstance and pick it to pieces. Indeed, in articulating the proper inquiry, this Court has "required only that some facts bearing on [any] particular issue[] be provided," not a deep dive into "each and every fact which contributed to [the officer's] conclusions." *Id.* at 230 n.6.

This Court has recognized that the totality-of-the-circumstances approach is entirely consistent with certain evidence being sufficiently compelling that nothing else is needed for probable cause. In *Gates*, the Court held that "rigorous scrutiny" is unnecessary when "an unquestionably honest citizen comes forward with a report of criminal activity." 462 U.S. at 233–34; see also *United States v. Doyle*, 650 F.3d 460, 472–73 (4th Cir. 2011). In *United States v. Ventresca*, the Court likewise observed that tips from "fellow officers" are "plainly a reliable basis" for probable cause. 380 U.S. 102, 111 (1965). Holding that an alert by a trained

drug-detection dog establishes probable cause is perfectly consistent with that precedent. Pet. Br. 15.

3. Respondent's reliance (at 19–25) on cases involving anonymous informants is misplaced as well. There is neither a real world nor doctrinal reason to lump drug-detection dogs in with suspicious anonymous tipsters. To the contrary, respondent himself concedes that, whereas a “confidential informant . . . may be more likely to knowingly mislead police for personal gain,” a dog lacks “the capacity to intentionally mislead.” Resp. Br. 24. To say the least.

A trained drug-detection dog is far more akin to the honest citizen—with no motive to mislead. Pet. Br. 15. As respondent puts it (at 24), “[i]ts reasons for alerting are driven by scent,” and—although many dogs emulate the best human traits (*e.g.*, friendliness, trustworthiness, and loyalty)—dogs lack the shortcomings of human nature, including unbecoming motives to be untruthful. It is true that a trained dog's alert is connected to a “reward” of positive reinforcement. Resp. Br. 24. But that is a far cry from the potentially nefarious purposes that courts have identified as the reason for more searching review of anonymous tips. *See, e.g., Maryland v. Cabral*, 859 A.2d 285, 300 (Md. Ct. Spec. App. 2004); *see also Gates*, 462 U.S. at 237 (“[T]he veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable.”). And a trained dog learns that positive reinforcement is only associated with an accurate alert.

4. Finally, it bears noting that neither respondent nor his amici challenge the settled proposition that an officer's own “plain smell” detection of contraband is sufficient to establish probable cause when an officer detects the odor of illegal drugs. *See* Pet. Br. 19–20;

*United States v. Johns*, 469 U.S. 478, 480 (1985); *Ventresca*, 380 U.S. at 111; *Johnson v. United States*, 333 U.S. 10, 13 (1948); *Taylor v. United States*, 286 U.S. 1, 6 (1932) (“[O]fficers may rely on a distinctive odor as a physical fact indicative of possible crime . . .”). And yet—even though the human nose is far less sensitive than the canine snout, Pet. Br. 16—courts have never held that an officer’s report that he smelled the presence of contraband is only sufficient when the officer’s nose passes a far-reaching evidentiary review into the officer’s reliability and past history. It is true that an officer may be cross-examined on *what* he smelled, but a drug-detection dog is trained to alert only to the presence of particular illegal substances.<sup>2</sup>

#### **B. Respondent’s Attempts To Impugn The Reliability Of Trained Drug-Detection Dogs Are Unfounded**

Respondent does not dispute that dogs—thanks to nature—have an extraordinary sense of smell. He does not dispute that humans have relied on that superior sense of smell for centuries for law enforcement and analogous purposes. And he does not dispute that trained detection dogs have long served as vital

---

<sup>2</sup> It is even possible that both the officer and his K-9 partner will detect contraband. In *Florida v. Jardines*, for example, Detective Pedraja himself smelled live marijuana plants when he went to the Jardines’ front door to ask for permission to search. Joint Appendix at 50, *Jardines*, No. 11-564 (U.S. Apr. 26, 2012). There is no reason to treat a dog’s alert to the presence of contraband as inherently less reliable than an officer’s “plain smell” detection of contraband. Indeed, if anything, because a dog’s sense of smell is so superior, a trained drug-detection dog’s alert ought to be an even *stronger* proxy for probable cause.

partners in law enforcement at the local, state, federal, and, indeed, international levels. Pet. Br. 16–19. The historical role that dogs have served in such matters is significant. Cf. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (When it comes to “discerning and applying” standards, “a page of history is worth a volume of logic.”) (Roberts, C.J., joined by Scalia and Ginsburg, JJ., concurring) (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)).

Nevertheless, respondent makes the broad-brush claim that, “[e]ven after training,” dogs are inherently unreliable because they may “sometimes” alert to “other dogs,” “lingering odor[s],” or “legal substances they mistake for drugs” (like perfume). Resp. Br. 7, 9; see *id.* at 24–25. That contention does not withstand scrutiny. Indeed, respondent himself seems to appreciate as much, because he eventually identifies *handlers* as “the source of ‘almost all erroneous alerts,’” *id.* at 36 (citation omitted)—a concern not raised below as to the search here. *Infra* at 11.

1. Respondent’s attempts to malign the reliability of trained drug-detection dogs pick up on trendy theories in law review commentary, but are unpersuasive when subjected to a real-world analysis:

*Other dogs.* Respondent’s lead example underscores the lengths to which he had to go to try to create the impression that trained detection dogs are unreliable. Respondent points to a 30-year-old case in which a dog alerted to an individual who happened to have been playing on the morning of the search with a dog “in heat.” Resp. Br. 25. But the remote possibility that a biological instinct could intervene in no way warrants calling into question the reliability of trained detection dogs as a general matter. Moreover,



respondent has pointed to nothing suggesting that the presence of “other dogs” is a genuine problem in the field—and the State is aware of no such evidence.

*Residual odors.* Respondent also points to the possibility of alerts to the “odor of drugs no longer present.” Resp. Br. 9. A trained drug-detection dog’s alert to the “lingering odor of drugs” (*id.* at 9) in no way calls into question its reliability. When you enter the kitchen and smell popcorn, the fact that someone has already eaten all the popcorn and put the bag outside in the trash takes nothing away from the fact that you accurately smelled popcorn in the kitchen. The same goes for drug-detection dogs that alert to the residual odors of drugs emanating from a vehicle.

More fundamentally, probable cause rises and falls on the “fair probability that contraband or evidence of a crime will be found.” *Gates*, 462 U.S. at 238 (emphasis added). Drug paraphernalia, clothing worn at “a party where other people were using drugs,” or “a vehicle that had formerly been used to transport drugs” all may be probative evidence of crime, just as evidence (like residual odors) that someone was using drugs in a vehicle may be evidence of a crime. Pet. App. A32 (citation omitted); Pet. Br. 30. Likewise, the possibility that a dog will alert to residual odors of a driver—like respondent here, Pet. Br. 4—that regularly “cooks” and uses methamphetamine or other listed drugs in no way calls into question the reliability of dogs.

*Non-contraband.* Last, respondent hypothesizes (at 9) that dogs will alert to the “smell of perfume.” Here again, it is telling that the best example that respondent apparently can come up with to demonstrate this concern is a 30-year-old case in which a purse searched following a dog’s alert contained “a



bottle of perfume” (Resp. Br. 25). And here again, everyday reality interferes with respondent’s hypothesis. If trained drug-detection dogs really were likely to alert to perfume, then dog alerts would be a routine event for countless Americans traveling through airports like Miami International each day.

More to the point, as this Court has recognized, drug-detection dogs are trained to detect “substance[s] that no individual has any right to possess” (*i.e.*, contraband), not lawful substances. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005). Amici speculate that some dogs may be trained using non-contraband and, by implication, may alert to substances like methyl benzoate rather than cocaine. See Fourth Amendment Scholars Br. 27–28. Although there is no record in this case that would allow the Court to consider that argument (*see Caballes*, 543 U.S. at 409), other research relied on by amici shows the opposite—that dogs do not alert to anything but drugs.<sup>3</sup> And as explained, the ballyhooed claim that dogs will alert to

---

<sup>3</sup> See, *e.g.*, Kenneth G. Furton et al., *Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction-Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency*, 40 J. Chromatographic Sci. 147, 154–55 (2002) (explaining that perfume odors containing methyl benzoate are “quite different” and can be “readily” distinguished by drug-detection dogs); see also Michael S. Macias et al., *A Comparison of Real Versus Simulated Contraband VOCs for Reliable Detector Dog Training Utilizing SPME-CG-MS*, 40 Am. Lab. 16, 19 (2008) (“None of the pseudo aids was reliably detected. This may stem from the fact that many of the commercial aids use components that do not create the same volatile odor compounds as the contraband parent compounds.”).

U.S. currency that has come into contact with cocaine has been debunked as well. Pet. Br. 31 n.6.

2. In the end, even respondent seems to recognize the shortcomings of this line of argument, because he ultimately argues that “[h]andler misinterpretation of a dog’s signals has been identified as the source of ‘almost all erroneous alerts.’” Resp. Br. 36 (emphasis added) (quoting law review article); see also Rutherford Br. 11 (suggesting “that a handler’s errors [may] account for nearly every false alert”). This argument does not help respondent—and has been waived—because respondent argued that Aldo falsely alerted “either due to canine error or a residual odor.” JA 16. He did not present “handler error” (Resp. Br. 7) as a third possibility. In any event, the possibility of “handler error” or “cueing” provides no reason for adopting the Florida Supreme Court’s extreme rule.

Although respondent did not do so below, any defendant is free to argue handler error. But the Fourth Amendment does not presume that police act in bad faith, and there is no reason to credit the assumption that canine officers will handle their dogs improperly, much less that they will handle their dogs improperly—and lie about it under oath. See *Franks v. Delaware*, 438 U.S. 154, 165 (1978) (Fourth Amendment presumes that officers will be “‘truthful’ in the sense that information put forth is believed or appropriately accepted . . . as true”). Thus, the mere possibility of handler error, in the absence of evidence that cueing actually occurred, does not defeat the reliability of a well-trained dog. See *United States v. Trayer*, 898 F.2d 805, 809 (D.C. Cir. 1990) (acknowledging the general possibility of cueing but rejecting a reliability challenge where there was no

evidence “that the handler had actually cued the dog”); *see also Ludwig*, 641 F.3d at 1252–53 (rejecting argument that dog was cued); *United States v. Diaz*, 25 F.3d 392, 395–96 (6th Cir. 1994) (same).<sup>4</sup>

### C. Respondent’s Efforts To Defend The Florida Supreme Court’s Extreme Evidentiary Requirements Fail

1. As the State has explained, evidence that a dog has successfully completed a bona fide training program provides sufficient evidence of reliability. The canine professionals who train K-9 dogs—the vast majority of whom are themselves active or retired law enforcement officers—are intimately familiar with the training methods that create effective drug-detection dogs. Moreover, any bona fide training program will require the successful completion of training exercises in a simulated environment in which the accuracy of a dog’s alerts can be definitively assessed. It is no surprise, then, that the strong weight of the federal

---

<sup>4</sup> The study cited by respondent (at 9, 35) and his amici that purports to show that unintentional handler error is common suffers from several fatal flaws. First, some handlers in the experiment confessed to *intentionally* cueing the dogs to the expected location of drugs. Lisa Lit et al., *Handler Beliefs Affect Scent Detection Dog Outcomes*, 14 *Animal Cognition* 387, 392 (2011). Second, there was no control group to establish a performance baseline. *See* SWGDOG, *SWGDOG Membership Commentary on “Handler beliefs affect scent detection dog outcomes” by L. Lit, J.B. Schweitzer and A.M. Oberbauer*, Mar. 31, 2011, <http://casgroup.fiu.edu/SWGDOG/news.php?id=2126> (last visited Sept. 19, 2012). And most egregiously, the organizers placed drugs in the examination area, threatening “contamination of the test area and test materials.” *Id.*

courts that have addressed this issue have concluded that successful completion of a narcotics-detection training program suffices to establish a dog's reliability. *See* Pet. Br. 21 n.3 (citing cases).

Respondent objects to the absence of uniform standards governing drug-detection training and argues that the absence of such standards prevents defendants from “challeng[ing] whether or not the particular detector dog and handling team complied with established procedures and requirements.” Resp. Br. 46 (citation omitted). But experience establishes that no one set of procedures is necessary to train a reliable dog. And more important, the judicial role is properly limited to determining whether a “credentialing organization[] is a sham,” rather than picking and choosing between different training procedures. *United States v. Ruiz*, 664 F.3d 833, 841 (10th Cir. 2012); *see also Ludwig*, 641 F.3d at 1251 (“[C]anine professionals are better equipped than judges to say whether an individual dog is up to snuff.”). The Fourth Amendment does not establish a Constitutional Code of K-9 Training Procedures.

Although evidence that a dog has successfully completed such a training program is *sufficient* to establish reliability, the Fourth Amendment does not limit the type of evidence that may be submitted to establish reliability. For example, reliability may be demonstrated by the successful completion of a training program, the fact that a dog has been certified in drug-detection by a bona fide organization, or a showing of proficiency in less formal training, but it need not be demonstrated in *each* of these ways. The Florida Supreme Court's evidentiary requirements for establishing reliability go far beyond what the Fourth

Amendment requires. And not surprisingly, respondent's efforts to defend those requirements fail.

2. Respondent's arguments (at 25–27) that the Fourth Amendment requires the introduction of field performance records should be rejected. Field performance records are unnecessary because they are not the most accurate evidence of canine reliability. It is impossible to determine in many circumstances why an alert in the field does not lead to recoverable quantities of drugs. Field records cannot, for example, reveal whether experienced traffickers hid drugs too well or whether drugs had been recently removed (leaving only residual odors or unrecoverable quantities of drugs). These records will systematically understate the reliability of narcotics-detection dogs.

For that reason, it is no surprise that, as respondent recognizes, the federal courts of appeal have “not required evidence of field performance [records].” Resp. Br. 39. Indeed, although some courts have *permitted* the introduction of field performance records (which is not inconsistent with a rule that such evidence is not required to establish probable cause), only one other court of which we are aware has adopted a rule *requiring* the introduction of such records. *Commonwealth v. Santiago*, 30 Mass. L. Rptr. 81, 2012 WL 2913495 (Mass. Super. Ct. May 22, 2012). That court—a Massachusetts trial court—based its decision heavily on the decision in this case. Respondent identifies (at 41–42) three other state court decisions, but in those cases the courts simply pointed to the existence of field performance evidence in the record. They did not adopt a rule requiring field-performance records in every case. See *Nebraska v. Howard*, 803 N.W.2d 450, 465 (Neb. 2011); *Oregon v.*



*Foster*, 252 P.3d 292, 301–302 (Or. 2011); *Oregon v. Helzer*, 252 P.3d 288, 290–91 (Or. 2011).

Respondent argues (at 37) that “[l]aw enforcement agencies already generate, maintain, and disclose field performance data.” As this case illustrates, that certainly is not true for all jurisdictions or police departments, and this Court should not take lightly the consequences of burdening officers in the field with additional recordkeeping requirements. But more fundamentally, the agencies that do maintain such records do not keep them so that they can be fodder for an evidentiary battle in suppression hearings over the reliability of trained drug-detection dogs. And while “field performance recordkeeping” (Resp. Br. 38) may be useful in evaluating procedures as a general matter, such recordkeeping is inherently *unhelpful* in assessing the reliability of dogs in the field because of the fact that there is no way to assess the accuracy of a field alert that does not result in the recovery of drugs (because of the possibility of residual odors or hidden drugs that an officer simply did not find).

3. Respondent also errs in arguing that a finding of reliability depends on a judicial examination of the dog’s initial certification records. Resp. Br. 43–47. Although a State may choose to present evidence that a dog has been certified to establish reliability, the Fourth Amendment does not impose the certification—and annual-recertification—requirement erected by the Florida Supreme Court and advanced by respondent here. Any jurisdiction may adopt such a requirement (and a few have), but the Fourth Amendment simply does not impose it. The same goes for respondent’s proposed *team* certification requirement for a dog and its handler. *Id.* at 43.



An officer like Officer Wheatley—who has received extensive training of his own on K-9 handling, gone through formal training with a dog, and engaged in continuous weekly training with that dog—will be exceedingly familiar with that dog’s “individual pattern for communicating an alert.” *Id.* (citation omitted). Such an officer will have no problem identifying that pattern as specific and articulable facts justifying the search. A certificate is wholly unnecessary to develop—or establish—the ability to note the tell-tale signs of a trained dog’s alert.

4. One thing should be clear: if this Court follows the Florida Supreme Court down the path of constitutionalizing the training procedures or certifications necessary to establish a dog’s reliability, the courts will immediately be required to fashion—and superintend—a whole new field of Canine Constitutional Procedure as defendants file one challenge after another to the particulars of the training or certifications received by the trained drug-detection dog who alerted to their vehicle.

To take just one example, respondent objects that the State did not prove that Aldo’s training “simulated different environments and distractions.” *Id.* at 57. Thus, under respondent’s view, the courts apparently would have to establish constitutional rules determining the number of “different environments” or “distractions” that training would have to address. Would that include testing to ensure that a dog will not be distracted by another dog “in heat” (*id.* at 25)? The same goes, apparently, for rules governing how drugs are “hidden” (*id.* at 57) in training. The list is potentially endless. See, e.g., *Foster*, 252 P.3d at 300 (defendant challenged adequacy of training on the

ground that, *inter alia*, the “imprint method of drug-detection” is better than the “play-reward method”).

Respondent makes the implausible claim that requiring the State to keep—and produce—records of “the dog’s success rate in training, the criteria used for certification, and field performance records” will make it “*unlikely*” that defendants will “seek suppression of evidence seized in a search following a dog alert.” Resp. Br. 50 (emphasis added). But for defendants with nothing to lose by seeking the suppression of seized drugs, the production of such materials will just be the first stage in a full-blown inquisition into all aspects of a dog’s training and performance.

#### D. The Record Amply Supports Officer Wheetley’s Decision To Search The Vehicle

The record in this case was more than sufficient to demonstrate that Aldo’s alert established probable cause. The evidence showed that Aldo successfully completed hundreds of hours of narcotics-detection training, including formal training with the Apopka Police Department. In addition, Aldo engaged in weekly training exercises with Officer Wheetley that tested and honed his ability to detect drugs in vehicles. Officer Wheetley testified that Aldo’s performance in those sessions was “really good,” explaining that if there were eight vehicles with drugs in them Aldo would alert to the eight vehicles. Pet. Br. 37–38.

Respondent’s efforts to poke holes in Aldo’s record should be rejected. Respondent objects that there was no “testimony whether Aldo’s weekly training with Wheetley included any false alerts.” Resp. Br. 58. But that is not right. Officer Wheetley testified that he took Aldo to vehicles without drugs during training “to

ensure that the dog was not alerting or showing an odor response to a vehicle that did *not* have narcotics.” JA 57 (emphasis added). In addition, the State explained during the suppression hearing that “a false alert would show up in [Aldo’s] training history when you have a vehicle or a place in which we know there are no drugs,” and that “[t]hat’s not shown in any of those records.” JA 92. So there is no serious question that Aldo’s training tested for “false” alerts as well.

Respondent also emphasizes (at 1, 11, 47) that Aldo’s initial certification had lapsed by the time of the search at issue. But neither Florida law (as respondent concedes (at 45)) nor the Fourth Amendment imposes an annual recertification requirement. Moreover, the implication that Aldo was rusty or ineffective because his initial certification had expired is belied by the extensive—and *continuous*—training that Aldo received and successfully completed. Although certification may also be sufficient to establish a dog’s reliability, the evidence of Aldo’s training was more than sufficient to establish his reliability here.

Nor is there any basis to second-guess Officer Wheatley’s decision to search the vehicle after Aldo’s alert. Respondent argues that the fact that Aldo alerted—*i.e.*, got “excited and . . . sat,” JA 63—in front of the “door handle” on the driver’s side door made it unreasonable for Officer Wheatley to believe that there were drugs “within” the vehicle. Resp. Br. 28. But Aldo was trained to detect the odor of drugs, including methamphetamine. So when he alerted to respondent’s vehicle, it meant—given his training—either that the “odor of narcotics” was “in th[e] vehicle” (and thus emanating from it at the door area), JA 64; or that someone who had “touched . . . or smoked narcotics”

had recently used the door handle, JA 80. And as it turned out, Aldo was 100% right. Respondent—who later admitted to using methamphetamine every “few days” and “cooking methamphetamine for about a year,” JA 68—was *Breaking Bad* on wheels.<sup>5</sup>

Respondent hypothesizes (at 58) that Aldo’s alert could have resulted from a “desperate” “drug user” checking for unlocked vehicles at a “mall[]” or “shopping center.” But it is well-settled that “an officer is not required to eliminate all innocent explanations for a suspicious set of facts to have probable cause to [act].” *Pennsylvania v. Dunlap*, 555 U.S. 964, 965–66 (2008) (Roberts, C.J., joined by Kennedy, J., dissenting from the denial of cert.); see *United States v. Arvizu*, 534 U.S. 266, 275–76 (2002). In any event, respondent—who was driving around with an expired tag and an open beer can in the passenger compartment, and who was “visibly nervous” and “shaking” when Officer Wheetley approached him, JA 62—hardly fit the bill of someone who was just on his way home from an innocent trip to JCPenney’s.

Finally, respondent tries to attach significance to the fact that Aldo subsequently alerted to respondent’s vehicle and that a search of respondent’s vehicle the second time also produced no drugs. Resp. Br. 1. But *subsequent* events could in no way undermine whether

---

<sup>5</sup> See, e.g., *United States v. Barry*, 394 F.3d 1070, 1078 (8th Cir. 2005) (dog’s alert to door-handle area created “fair probability that contraband or evidence of crime would be found in [defendant’s] vehicle”) (internal quotation marks and citation omitted); Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. 1, 22 (2006) (noting that “odors could be expected to emerge from inside the vehicle” at door seams).

probable cause existed when Officer Wheatley chose to conduct the search at issue—which must be evaluated based on the circumstances that Officer Wheatley faced at the time of *that* search. Pet. Br. 13–14. And, in any event, given respondent’s admitted history of cooking and using methamphetamine (*id.* at 4), the fact that the search did not uncover drugs is hardly evidence that Aldo did not accurately detect the odor of drugs.

\* \* \* \* \*

In the real world in which they work, police officers have to make prompt, on-the-spot judgments about whether probable cause exists to conduct a search based on the circumstances at hand. In the situation he faced, Officer Wheatley made a common-sense decision to search respondent’s vehicle after Aldo alerted to it. Given his knowledge of Aldo’s successful training, he reasonably relied on Aldo’s alert as signaling the presence of illegal drugs. Aldo’s alert indicated at least a “fair probability” or “substantial chance” of the presence of drugs. The search at issue was therefore entirely consistent with the Fourth Amendment.

## CONCLUSION

For foregoing reasons, the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

GREGORY G. GARRE  
*Counsel of Record*  
BRIAN D. SCHMALZBACH  
*Special Assistant*  
*Attorneys General*  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW  
Suite 1000  
Washington, DC 20004  
(202) 637-2207  
gregory.garre@lw.com

PAMELA JO BONDI  
*Attorney General of*  
*Florida*  
CAROLYN M. SNURKOWSKI  
*Associate Deputy*  
*Attorney General*  
ROBERT J. KRAUSS  
*Chief-Assistant*  
*Attorney General*  
SUSAN M. SHANAHAN  
*Assistant Attorney*  
*General*  
OFFICE OF THE ATTORNEY  
GENERAL  
3507 E. Frontage Road  
Suite 200  
Tampa, FL 33607-7013

SEPTEMBER 2012



**AMICUS  
CURIAE  
BRIEF**

**In the Supreme Court of the United States**

---

STATE OF FLORIDA, PETITIONER

*v.*

CLAYTON HARRIS

---

*ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF FLORIDA*

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER**

---

DONALD B. VERRILLI, JR.  
*Solicitor General  
Counsel of Record*

LANNY A. BREUER  
*Assistant Attorney General*

MICHAEL R. DREEBEN  
*Deputy Solicitor General*

JOSEPH R. PALMORE  
*Assistant to the Solicitor  
General*

SONJA M. RALSTON  
*Attorney*

*Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217*

---

### **QUESTION PRESENTED**

Whether an alert by a trained drug-detection dog is sufficient to establish probable cause for a search of an automobile.



## TABLE OF CONTENTS

|                                                                                                        | Page |
|--------------------------------------------------------------------------------------------------------|------|
| Interest of the United States .....                                                                    | 1    |
| Statement .....                                                                                        | 2    |
| Summary of argument .....                                                                              | 7    |
| <b>Argument:</b>                                                                                       |      |
| I. A dog's detection of drug odor it is trained to identify establishes probable cause to search ..... | 10   |
| II. A drug-detection dog's reliability is established by its training .....                            | 15   |
| A. A drug-detection dog's reliability is established by its performance in controlled settings .....   | 16   |
| B. Courts should not constitutionalize canine training or certification standards .....                | 24   |
| C. Officers need a clear rule to guide decisions in the field .....                                    | 27   |
| III. The drug-detection dog's alert provided probable cause to search respondent's truck .....         | 29   |
| Conclusion .....                                                                                       | 30   |

## TABLE OF AUTHORITIES

### Cases:

|                                                                |               |
|----------------------------------------------------------------|---------------|
| <i>Atwater v. City of Lago Vista</i> , 532 U.S. 318 (2001) ... | 10, 27        |
| <i>California v. Acevedo</i> , 500 U.S. 565 (1991) .....       | 27            |
| <i>Florida v. J.L.</i> , 529 U.S. 266 (2000) .....             | 22            |
| <i>Illinois v. Caballes</i> , 543 U.S. 405 (2005) .....        | 5, 13         |
| <i>Illinois v. Gates</i> , 462 U.S. 213 (1983) .....           | <i>passim</i> |
| <i>Jones v. Commonwealth</i> , 670 S.E.2d 727 (Va. 2009) ..... | 21            |
| <i>Maryland v. Pringle</i> , 540 U.S. 366 (2003) .....         | 5, 7, 8, 10   |
| <i>McDonald v. United States</i> , 335 U.S. 451 (1948) .....   | 11            |

# IV

| Cases—Continued:                                                                                                 | Page          |
|------------------------------------------------------------------------------------------------------------------|---------------|
| <i>Minnesota v. Dickerson</i> , 508 U.S. 366 (1993) . . . . .                                                    | 11            |
| <i>Pennsylvania v. Dunlap</i> , 555 U.S. 964 (2008) . . . . .                                                    | 15            |
| <i>People v. Stillwell</i> , 129 Cal. Rptr. 3d 233<br>(Ct. App. 2011) . . . . .                                  | 20            |
| <i>Perkins v. State</i> , 685 S.E.2d 300 (Ga. Ct. App. 2009) . . . .                                             | 21            |
| <i>Phelps v. State</i> , No. S-11-0215, 2012 WL 2306407<br>(Wyo. June 19, 2012) . . . . .                        | 28            |
| <i>Spinelli v. United States</i> , 393 U.S. 410 (1969) . . . . .                                                 | 10            |
| <i>State v. Cabral</i> , 859 A.2d 285 (Md. Ct. Spec. App.<br>2004) . . . . .                                     | 14, 22        |
| <i>State v. Carlson</i> , 657 N.E.2d 591 (Ohio Ct. App. 1995) . . .                                              | 14            |
| <i>State v. Foster</i> , 252 P.3d 292 (Or. 2011) . . . . .                                                       | <i>passim</i> |
| <i>State v. Nguyen</i> , 811 N.E.2d 1180 (Ohio Ct. App.<br>2004) . . . . .                                       | 20            |
| <i>State v. Nguyen</i> , 726 N.W.2d 871 (S.D. 2007) . . . . .                                                    | 28            |
| <i>State v. Yeoumans</i> , 172 P.3d 1146 (Idaho Ct. App.<br>2007) . . . . .                                      | 14            |
| <i>Texas v. Brown</i> , 460 U.S. 730 (1983) . . . . .                                                            | 11, 15        |
| <i>United States v. Berry</i> , 90 F.3d 148 (6th Cir.),<br>cert. denied, 519 U.S. 999 (1996) . . . . .           | 26            |
| <i>United States v. Diaz</i> , 25 F.3d 392 (6th Cir.<br>1994) . . . . .                                          | 18, 22, 29    |
| <i>United States v. Funds in the Amount of \$30,670</i> ,<br>403 F.3d 448 (7th Cir. 2005) . . . . .              | 13            |
| <i>United States v. Howard</i> , 621 F.3d 433 (6th Cir. 2010),<br>cert. denied, 131 S. Ct. 1623 (2011) . . . . . | 28            |
| <i>United States v. Jacobsen</i> , 466 U.S. 109 (1984) . . . . .                                                 | 22            |
| <i>United States v. Johns</i> , 469 U.S. 478 (1985) . . . . .                                                    | 8, 11         |
| <i>United States v. Johnson</i> , 660 F.2d 21 (2d Cir. 1981) . . . .                                             | 14            |



| Cases—Continued:                                                                                                   | Page               |
|--------------------------------------------------------------------------------------------------------------------|--------------------|
| <i>United States v. Ludwig</i> , 641 F.3d 1243 (10th Cir.),<br>cert. denied, 132 S. Ct. 306 (2011) . . . . .       | 10, 14, 19, 26, 27 |
| <i>United States v. Marvin</i> , 720 F.2d 12 (8th Cir. 1983) . . . .                                               | 22                 |
| <i>United States v. Meyer</i> , 536 F.2d 963 (1st Cir.<br>1976) . . . . .                                          | 22, 26             |
| <i>United States v. Parada</i> , 577 F.3d 1275 (10th Cir.<br>2009), cert. denied, 130 S. Ct. 3321 (2010) . . . . . | 28                 |
| <i>United States v. Place</i> , 462 U.S. 696 (1983) . . . . .                                                      | 5, 22              |
| <i>United States v. Robinson</i> , 390 F.3d 853 (6th Cir.<br>2004) . . . . .                                       | 25                 |
| <i>United States v. Sanchez-Pena</i> , 336 F.3d 431 (5th Cir.<br>2003) . . . . .                                   | 25                 |
| <i>United States v. Stubblefield</i> , No. 10-3587,<br>2012 WL 2290870 (6th Cir. June 19, 2012) . . . . .          | 29                 |
| <i>United States v. Ventresca</i> , 380 U.S. 102 (1965) . . . . .                                                  | 11                 |
| <i>Virginia v. Moore</i> , 553 U.S. 164 (2008) . . . . .                                                           | 27                 |
| <i>Wiggs v. State</i> , 72 So. 3d 154 (Fla. Dist. Ct.<br>App. 2011) . . . . .                                      | 23, 24, 28         |
| Miscellaneous:                                                                                                     |                    |
| Sandy Bryson, <i>Police Dog Tactics</i> (2d ed.<br>2000) . . . . .                                                 | 13, 16, 17, 18, 25 |
| Edward E. Dean, Southwest Research Inst., <i>Train-<br/>ing Dogs for Narcotic Detection</i> (1972) . . . . .       | 16, 24             |

Kenneth G. Furton et al.:

*Field and Laboratory Comparison of the Sensitivity and Reliability of Cocaine Detection on Currency Using Chemical Sensors, Humans, K-9s and SPME/GC/MS/MS Analysis*, in *Investigation and Forensic Science Technologies*, 3576 Proc. SPIE 41 (Kathleen Higgins ed., 1999) . . . . . 13

Florida Int'l Univ., *The Scientific Working Group on Dog and Orthogonal Detector Guidelines* (2010) . . . . . 17, 18, 20, 26

William S. Helton, *Overview of Scent Detection Work: Issues and Opportunities*, in *Canine Ergonomics: The Science of Working Dogs* (William S. Helton ed., 2009) . . . . . 12

Paul B. Jennings, Jr., *Origins and History of Security and Detector Dogs*, in *Canine Sports Medicine and Surgery* (Mark S. Bloomberg et al. eds., 1998) . . . . 1

J.M. Johnston, Institute for Biological Detection Sys., Auburn Univ., *Canine Detection Capabilities: Operational Implications of Recent R&D Findings* (June 1999) . . . . . 24

Norma Lorenzo et al., *Laboratory and Field Experiments Used to Identify Canis Lupus Var. Familiaris Active Odor Signature Chemicals from Drugs, Explosives, and Humans*, 376 *Analytical & Bioanalytical Chemistry* 1212 (2003) . . . . . 12

Richard A. Medema, Drug Enforcement Admin., U.S. Dep't of Justice, *Guide to Canine Interdiction* App. E (2000 ed.) . . . . . 14

Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 *Geo. Mason L. Rev.* 1 (2006) . . . . . 15

# VII

| Miscellaneous—Continued:                                                                                                                                                                                                                                              | Page   |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| SWGDOG Update (Mar. 2010), <a href="http://casgroup.fiu.edu/pages/docs/1060/1306436244_History_&amp;_Goals_of_SWGDOG.pdf">http://casgroup.fiu.edu/pages/docs/1060/1306436244_History_&amp;_Goals_of_SWGDOG.pdf</a> . . . .                                            | 20     |
| Andrew E. Taslitz, <i>Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup</i> , 42 Hastings L.J. 15 (1990) . . . . .                                                                                                                               | 12     |
| U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot., <i>History of CBP Canine Centers</i> (2010), <a href="http://www.cbp.gov/xp/cgov/border_security/canine/history_3.xml">http://www.cbp.gov/xp/cgov/border_security/canine/history_3.xml</a> . . . . .      | 16     |
| U.S. Dep't of the Army, Pamphlet No. 190-12, <i>Military Working Dog Program</i> (1993) . . . . .                                                                                                                                                                     | 16, 18 |
| L. Paul Waggoner et al., <i>Canine Olfactory Sensitivity to Cocaine Hydrochloride and Methyl Benzoate</i> , in <i>Chemistry- and Biology-Based Technologies for Contraband Detection</i> , 2937 Proc. SPIE 216 (Pierre Pilon & Steve Burmeister eds., 1997) . . . . . | 12     |

# In the Supreme Court of the United States

---

No. 11-817

STATE OF FLORIDA, PETITIONER

v.

CLAYTON HARRIS

---

ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF FLORIDA

---

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER

---

## INTEREST OF THE UNITED STATES

This case presents the question whether an alert by a trained drug-detection dog is sufficient to establish probable cause for a search of an automobile. Federal law enforcement officers and homeland security personnel routinely use dogs to detect illegal drugs, explosives, and other substances. See Paul B. Jennings, Jr., *Origins and History of Security and Detector Dogs*, in *Canine Sports Medicine and Surgery* 16, 18-19 (Mark S. Bloomberg et al. eds., 1998). In addition, the United States prosecutes cases in which state authorities obtain evidence using such detection dogs. Accordingly, the Court's resolution of the question presented in this case will affect federal investigations and prosecutions.

## STATEMENT

1. On June 24, 2006, Officer William Wheatley of the Liberty County, Florida, Sheriff's Office conducted a traffic stop of respondent after noting that the license plate on respondent's truck was expired. J.A. 61. Officer Wheatley approached the driver's-side door of the truck and saw that respondent was shaking, unable to stay still, and "visibly nervous." J.A. 62. The officer also observed an open can of beer sitting in the cup holder. *Ibid.* Officer Wheatley asked respondent for consent to search his truck, but respondent refused. J.A. 63.

Officer Wheatley then retrieved his trained drug-detection dog, Aldo, from his patrol car. J.A. 63. While doing so, he noticed respondent "moving around" in the truck and talking on his cell phone. *Ibid.* Aldo conducted a "free air sniff" around respondent's truck and alerted at the driver's-side door handle. *Ibid.*<sup>1</sup>

Based on Aldo's alert to the odor of drugs, as well as respondent's nervous behavior, the expired tag, and the open container of alcohol, Officer Wheatley concluded he had probable cause to search respondent's truck for evidence of illegal drugs. J.A. 64-65. The search revealed approximately 200 loose pseudoephedrine pills, 8000 matches, a bottle of muriatic (hydrochloric) acid, two bottles of antifreeze, and iodine crystals. J.A. 21-22, 65. These are ingredients for making methamphetamine. J.A. 66.

After being arrested and receiving *Miranda* warnings, respondent told Officer Wheatley that he had pur-

---

<sup>1</sup> When Aldo smells the odor of drugs, he takes a long sniff, becomes excited, and sits down. J.A. 57. Officer Wheatley understands that behavior as an alert. *Ibid.*

chased the methamphetamine ingredients from various stores in Tallahassee and acknowledged that he routinely “cooked” methamphetamine at his house. J.A. 67-68. Respondent stated that he could not go “more than a few days” without using methamphetamine and that his addiction was a “big problem.” J.A. 68.

2. After respondent was charged in state court with possession of the listed chemical pseudoephedrine with intent to use it to manufacture methamphetamine, Pet. App. A7, he moved to suppress the evidence seized from his truck on the asserted ground that Aldo was insufficiently reliable to provide a basis for probable cause to search the vehicle, J.A. 15-18.

At a suppression hearing, Officer Wheatley testified about both his and Aldo’s training in canine drug detection. J.A. 53-60. In 2004, Officer Wheatley (and a different dog) completed a 160-hour drug-detection course offered by the Dothan Police Department, and that same year, Aldo (and a different handler) completed a 120-hour drug-detection course offered by the Apopka Police Department. J.A. 53-54. Aldo was certified by Drug Beat, a national certification company, to detect marijuana, methamphetamine, heroin, ecstasy, and both crack and powder cocaine. J.A. 54-55, 70, 103-104. The Drug Beat certification in the record appears to have been valid through February 2005, J.A. 103-104, and the record does not indicate that Aldo was recertified.<sup>2</sup> But in early 2006 (after Officer Wheatley became Aldo’s handler in July 2005), they successfully completed a 40-hour drug-detection course with the Dothan Police Department. J.A. 54-55, 105.

---

<sup>2</sup> Florida does not require drug-detection dogs to be certified. See J.A. 70.



Officer Wheatley also testified that each week he did four hours of "continual training" with Aldo. J.A. 54, 56. During this training, which occurred variously in a building or with a number of vehicles, Officer Wheatley placed drugs in some locations and left others "[b]lank." J.A. 56-57. He would have Aldo sniff all of the locations to ensure the dog was not falsely alerting to those without drugs. J.A. 57. Aldo's performance during these training exercises was "really good." J.A. 60. Officer Wheatley also recorded instances when Aldo had alerted "in the field" and an arrest had followed. J.A. 60, 72, 74.

In addition, Officer Wheatley and another officer testified about a subsequent stop of respondent while he was driving the same truck. J.A. 44-50, 75-77. During that stop, which occurred approximately two months after the one described above, Officer Wheatley had Aldo conduct a sniff of the truck, and the dog again alerted to the driver's-side door handle. J.A. 75; Pet. App. A11. Officer Wheatley searched the truck, but he did not find drugs or drug-related evidence on that occasion. J.A. 76. Officer Wheatley explained that, given respondent's admitted frequent use and cooking of methamphetamine, he likely transferred the drug odor to the door handle from his hands after having made or used the drug, leaving a "residual odor." J.A. 80. Officer Wheatley explained that Aldo was "trained to alert to the odor of narcotics" and "alerted to the odor of narcotics on the door handle." J.A. 81.

The trial court concluded that there was probable cause to search respondent's truck and denied the suppression motion. J.A. 92. Respondent then entered a no-contest plea while reserving the right to appeal the denial of his suppression motion. Pet. App. A14. He was

sentenced to 24 months of imprisonment, to be followed by five years of probation. *Ibid.*

3. After an intermediate state appellate court summarily affirmed, Pet. App. A1-A2, the Florida Supreme Court reversed, holding that the evidence from respondent's truck should have been suppressed, *id.* at A3-A52.

The court acknowledged that a sniff of a vehicle by a trained drug-detection dog is not itself a search. See Pet. App. A25 (citing *Illinois v. Caballes*, 543 U.S. 405, 409 (2005), and *United States v. Place*, 462 U.S. 696, 707 (1983)). The court also recognized that an officer may search an automobile without a warrant if the officer has "probable cause to believe that the vehicle contains contraband," *id.* at A22, and that probable cause "is a fluid concept \* \* \* not readily, or even usefully, reduced to a neat set of legal rules," *id.* at A23 (quoting *Maryland v. Pringle*, 540 U.S. 366, 370-371 (2003)). When a drug-detection dog positively alerts to a motor vehicle, however, the court held that probable cause may be established only when the government proves the dog's reliability through satisfaction of detailed requirements established by the court. *Id.* at A6.

In particular, the court said the government must present the dog's "training and certification records" and "an explanation of the meaning of the particular training and certification of that dog." Pet. App. A6. In addition, the court held that the government must introduce "field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability in being able to detect the presence of illegal substances within the vehicle." *Ibid.* Evidence that the dog had been trained and

certified, “standing alone,” would not be sufficient. *Id.* at A5.

The court said such a rigorous inquiry was necessary because “a dog may alert to a residual odor, which may not indicate the presence of drugs in the vehicle at the time of the sniff.” Pet. App. A32. Based on that concern, the court held that “evidence of the dog’s performance history in the field—and the significance of any incidents where the dog alerted without contraband being found—is part of a court’s evaluation of the dog’s reliability under a totality of the circumstances analysis.” *Id.* at A33. In future cases, the court said, the government could attempt to show that prior alerts that did not lead to recovery of drugs were actually alerts to residual odors, but stressed that such a showing would not necessarily help the government because that explanation would “raise[] its own set of concerns” about whether the dog’s alert was sufficient for probable cause. *Id.* at A34. In such cases, trial courts would be required “to evaluate how any inability to distinguish between residual odors and drugs that are actually present bears on the reliability of the alert in establishing probable cause,” *ibid.*, and courts might conclude “that a dog’s inability to distinguish between residual odors and actual drugs undermines a finding of probable cause,” *id.* at A45-A46.

Applying its multi-factor test to the circumstances of this case, the court found the State’s evidence insufficient to establish probable cause. Pet. App. A40-A48. In addition to finding the records of Aldo’s training and certification insufficiently thorough, *id.* at A41, A44-A45, the court faulted the State for not “introduc[ing] Aldo’s field performance records so as to allow an analysis of the significance of the alerts where no contraband was

found,” *id.* at A42. The absence of such records deprived the court of “the benefit of quantifying Aldo’s success rate in the field.” *Id.* at A42, A42-A43 n.12.

The court also found that “the State ha[d] failed to explain why an alert to a residual odor on the door handle [of respondent’s truck] would give rise to probable cause in this case.” Pet. App. A46. Such residual odor, according to the court, “indicates only that someone who has come into contact with drugs touched the door handle at some point.” *Id.* at A47. The court said this case itself “may have involved a false alert” because the search of respondent’s truck found only methamphetamine ingredients (whose odor Aldo was not trained to detect), rather than actual methamphetamine (whose odor Aldo was trained to detect). *Ibid.*

Chief Justice Canady dissented. Pet. App. A49-A52. He stated that the “elaborate and inflexible evidentiary requirements” the majority had established “demand[] a level of certainty that goes beyond what is required” by probable cause, which is a “‘practical, nontechnical conception.’” *Id.* at A50 (quoting *Pringle*, 540 U.S. at 370). Chief Justice Canady noted that Aldo’s training and certification constituted “an objectively reasonable basis for crediting [his] alert” and that such an alert provides the required fair probability of finding evidence of a crime. *Id.* at A51-A52.

#### SUMMARY OF ARGUMENT

The alert of a trained drug-detection dog provides probable cause to search an automobile for contraband or evidence of a crime.

1. Probable cause to search exists when “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*,

462 U.S. 213, 238 (1983). That standard does not require the degree of certainty that would be required to establish proof of guilt or even to establish a fact by a preponderance of the evidence. See *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

Probable cause to search is often based on an officer's sensory observations, including his sense of smell. See, e.g., *United States v. Johns*, 469 U.S. 478, 482 (1985). That is so because the presence of a distinctive odor at a particular location makes it fairly probable that the substance producing it is present there. And because a dog's sense of smell is far superior to a human's, an alert by a dog trained to identify certain odors provides an even stronger basis for probable cause to search a location for the odor's source.

The Florida Supreme Court's concern that a drug-detection dog may alert to "residual odor," rather than a seizable quantity of drugs, Pet. App. A46-A47, was misplaced. The presence of the odor of drugs at a location provides a fair probability to search that location for drugs or evidence of drug crimes. A dog's superior sense of smell permits it to detect faint odors that are undetectable to humans. That ability is what makes the dog valuable to law enforcement: it enables the dog to alert to drugs that are well-hidden or whose odors are masked by other scents. A positive canine alert does not establish a certainty that contraband or evidence of a crime will be present. But certainty is not required for probable cause, and the possibility of a hypothetical innocent explanation for the presence of drug odor at a location does not undermine the existence of probable cause to search.

2. Testing a drug-detection dog in a controlled setting provides the only valid means of evaluating that



dog's reliability. In such a training or certification environment, it is known which locations have drug odor and which do not. Accordingly, a dog's alerts and non-alerts can be correlated to those known locations to assess the dog's overall reliability.

Evidence of a dog's performance in the field is of an entirely different nature. In the field, an alert that does not lead to discovery of a seizable quantity of drugs cannot be classified as a false alert; instead, it is merely an unconfirmed one. The drugs might have been too well hidden to be found, or the dog might have alerted to the presence of drug paraphernalia coated in drug residue or to residue left by recent drug use at the location. Those would all be accurate alerts, and the possibility of their having occurred does not undermine the reliability of the drug-detection dog. Accordingly, it should not be necessary to introduce evidence about unconfirmed alerts in the field to support probable cause at a suppression hearing. Indeed, such evidence is more likely to confuse, rather than illuminate, the reliability inquiry.

Nor should it be necessary to introduce evidence about the specifics of a particular dog's training or certification at a suppression hearing. Such hearings should not be transformed into mini-trials on technical issues of dog training. Instead, courts should generally defer to the expertise of the professionals who train drug-detection dogs and limit their inquiry to establishing that the relevant training program or certifying organization is bona fide. Such deference is particularly warranted because law enforcement has its own strong and independent interests in ensuring that such dogs are well trained so that they will accurately perform their assigned role.



A clear rule that an alert by a trained drug-detection dog provides probable cause to search gives law enforcement officers needed certainty in fluid field situations. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). By contrast, the Florida Supreme Court's rule, which would base a dog's reliability in significant part on an attempt to quantify its (ever-changing) field performance and a court's own assessment of training methods, would require officers "to guess whether the dog's performance will survive judicial scrutiny after the fact." *United States v. Ludwig*, 641 F.3d 1243, 1251 (10th Cir.), cert. denied, 132 S. Ct. 306 (2011).

3. The drug-detection dog's alert to the presence of drug odor provided probable cause to search respondent's truck. Both the dog and its handler had received extensive training, and they engaged in regular weekly maintenance training together. J.A. 53-60. Because the dog proved reliable in such controlled settings, evidence about any unconfirmed alerts it may have made in the field was unnecessary to establish probable cause.

### ARGUMENT

#### I. A DOG'S DETECTION OF DRUG ODOR IT IS TRAINED TO IDENTIFY ESTABLISHES PROBABLE CAUSE TO SEARCH

Probable cause to search exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Probable cause requires a "probability, and not a prima facie showing, of criminal activity." *Id.* at 235 (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in

the [probable cause] decision.” *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (brackets in original) (quoting *Gates*, 462 U.S. at 235); see *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion) (finding of probable cause “does not demand any showing that such a belief be correct or more likely true than false”). “[A]s the very name implies,” “probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.” *Gates*, 462 U.S. at 231, 232 (citation omitted).

The information providing the basis for probable cause to search may take the form of a sensory observation by a law enforcement officer, such as an observation that is visual, see, *e.g.*, *Brown*, 460 U.S. at 742-743 (plurality opinion) (officer observed balloon inside car that he thought likely contained drugs), aural, see, *e.g.*, *McDonald v. United States*, 335 U.S. 451, 454 (1948) (hypothesizing case in which “officers, passing by on the street, hear a shot and a cry for help”), or tactile, see, *e.g.*, *Minnesota v. Dickerson*, 508 U.S. 366, 375-377 (1993) (discussing “contraband plainly detected through the sense of touch”). Likewise, an officer’s detection of a distinctive odor indicative of contraband at a location can provide a basis for probable cause to search it. See, *e.g.*, *United States v. Johns*, 469 U.S. 478, 482 (1985) (“After the officers came closer and detected the distinct odor of marihuana, they had probable cause to believe that the vehicles contained contraband.”); *United States v. Ventresca*, 380 U.S. 102, 111 (1965) (“A qualified officer’s detection of the smell of mash has often been held a very strong factor in determining that probable cause exists.”). This basis for probable cause rests on the commonsense understanding that when one encounters

an odor, there is a reasonable probability that its source is nearby.

An alert by a trained drug-detection dog operates on the same principle. Rather than relying on his own sense of smell to detect an odor indicative of the presence of contraband, the officer relies on the dog's superior ability to do so.<sup>3</sup> Each drug has a "scent signature,"

---

<sup>3</sup> Contrary to the Florida Supreme Court's view, the effectiveness of dogs in detecting the odor of drugs is not a "myth." Pet. App. A30 (quoting Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 Hastings L.J. 15, 22, 28 (1990)). The canine's effectiveness (because of both its extraordinary sensitivity to odors and its refined ability to discriminate among them) is well-established. See William S. Helton, *Overview of Scent Detection Work: Issues and Opportunities*, in *Canine Ergonomics: The Science of Working Dogs* 83, 93 (William S. Helton ed., 2009) (Helton) ("[D]etector dogs deserve their reputation as the gold standards of detection technology."); Norma Lorenzo et al., *Laboratory and Field Experiments Used to Identify Canis Lupus Var. Familiaris Active Odor Signature Chemicals from Drugs, Explosives, and Humans*, 376 Analytical & Bioanalytical Chemistry 1212, 1212 (2003) ("Even with technological advances in instruments, detector dogs still represent one of the most reliable real time detectors of contraband."); L. Paul Waggoner et al., *Canine Olfactory Sensitivity to Cocaine Hydrochloride and Methyl Benzoate*, in *Chemistry- and Biology-Based Technologies for Contraband Detection*, 2937 Proc. SPIE 216, 216 (Pierre Pilon & Steve Burmeister eds., 1997) ("The dog's olfactory detection capabilities rival or surpass that of analytical instruments, and the dog-handler detection team remains the most effective technology available to law enforcement for the detection of narcotics."). Humans have relied for centuries on dogs' superior abilities to detect odors and discriminate among them, see U.S. Br. at 18-19 & n.5, *Florida v. Jardines*, No. 11-564 (May 3, 2012), and in modern times dogs "have been trained to detect estrus in dairy cows, cancer, contamination in aquaculture tank water, compact discs and DVDs, invasive species, accelerants, explosives, narcotics, insect infestations, microbial growth, wood rot, gas leaks, toxins, and scat of a wide range of species," Helton 83.

a particular combination of molecules that a dog is trained to recognize. Sandy Bryson, *Police Dog Tactics* 256 (2d ed. 2000) (Bryson) (emphasis omitted). And “[d]epending on the scent density and rate of diffusion, the dog,” unlike a human, “can detect drugs despite masking scents, intervening structures, vehicle bodies, or multiple layers of packaging.” *Id.* at 243. When the dog indicates that the odor of drugs is present at a particular location, there is probable cause to search it.

The Florida Supreme Court believed that a drug-detection dog’s reliability is undermined because its alert may be to “residual odor” rather than nearby drugs. Pet. App. A46-A47. The court’s concern was misplaced. Drug-detection dogs are trained to recognize “drug scent,” and “[i]n terms of physics and chemistry, the scent is not the drug,” just as “human scent is not a person.” Bryson 256. Accordingly, when a trained drug-detection dog alerts, it is indicating that an odor it is trained to recognize is present. That indication establishes a fair probability—all that is required for probable cause—of the presence of drugs or other evidence of a crime associated with drugs, such as drug paraphernalia, precursor chemicals, money,<sup>4</sup> guns, logs, or packag-

---

<sup>4</sup> The concern that drug-detection dogs might alert to trace amounts of cocaine residue reported to linger on much of the U.S. currency in circulation, see, e.g., *Illinois v. Caballes*, 543 U.S. 405, 411-412 (2005) (Souter, J., dissenting), has been debunked. See *United States v. Funds in the Amount of \$30,670*, 403 F.3d 448, 459 (7th Cir. 2005) (crediting study demonstrating that “circulated currency, innocently contaminated with [microgram] quantities of cocaine would not cause a properly trained detection canine to signal an alert even if very large numbers of bills are present”) (brackets in original) (quoting Kenneth G. Furton et al., *Field and Laboratory Comparison of the Sensitivity and Reliability of Cocaine Detection on Currency Using Chemical Sensors, Humans, K-9s and SPME/GC/MS/MS Analysis*, in *Investiga-*



ing. See *State v. Foster*, 252 P.3d 292, 298-300 (Or. 2011); see also *Gates*, 462 U.S. at 238 (probable cause exists whenever “there is a fair probability that contraband or evidence of a crime will be found in a particular place”). Indeed, “drug residue” itself is “evidence of a crime.” *United States v. Ludwig*, 641 F.3d 1243, 1252 n.5 (10th Cir.), cert. denied, 132 S. Ct. 306 (2011).

Certainty is not required for probable cause, so the mere possibility that a dog’s alert may have been to residual odor of drugs no longer present is immaterial.<sup>5</sup>

---

*tion and Forensic Science Technologies*, 3576 Proc. SPIE 41, 46 (Kathleen Higgins ed., 1999)); Richard A. Medema, Drug Enforcement Admin., U.S. Dep’t of Justice, *Guide to Canine Interdiction* App. E (2000 ed.) (“[A] positive alert to U.S. currency by a trained narcotics detection canine indicates that the currency had recently, or just before packaging, been in close or actual proximity to a significant amount of narcotics, and is not the result of any alleged innocent environmental contamination of circulated U.S. currency by microscopic traces of cocaine.”).

<sup>5</sup> See *Foster*, 252 P.3d at 299 (“[T]he possibility that a trained drug-detection dog will alert to a residual odor, rather than the actual presence of drugs, does not *ipso facto* render it unreasonable to believe that drugs or other seizable things are *probably* present.”); *State v. Yeoumans*, 172 P.3d 1146, 1149-1150 (Idaho Ct. App. 2007) (“An alert by an otherwise reliable, certified drug detection dog is sufficient to demonstrate probable cause to believe contraband is present even if there exists a possibility that the dog has alerted to residual odors.”); *State v. Cabral*, 859 A.2d 285, 300 (Md. Ct. Spec. App. 2004) (“The possibility that the contraband may no longer be present in the vehicle does not compel the finding that there is no probable cause; for purposes of the probable cause analysis, we are concerned with probability, not certainty.”); *State v. Carlson*, 657 N.E.2d 591, 601-602 (Ohio Ct. App. 1995) (rejecting “stale odor” objection to probable cause); see also *United States v. Johnson*, 660 F.2d 21, 22-23 (2d Cir. 1981) (“[A]ppellant’s argument with respect to the problem of a dog detecting only the residual odors as opposed to the drugs themselves

Likewise, the possibility that drug odor may be present because “the person being searched had attended a party where other people were using drugs,” Pet. App. A32 (quoting Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. 1, 4 (2006)), or for some other reason unconnected to wrongdoing by a car’s occupant, does not undermine probable cause. See *Foster*, 252 P.3d at 299; cf. *Pennsylvania v. Dunlap*, 555 U.S. 964, 965-966 (2008) (Roberts, C.J., dissenting from denial of cert.) (“[A]n officer is not required to eliminate all innocent explanations for a suspicious set of facts to have probable cause to make an arrest.”). For example, an officer seeing white powder does not know without a chemical test that it is cocaine instead of baking soda, but probable cause exists if he sees it in a car next to small vials and balloons. See *Brown*, 460 U.S. at 734. “In making a determination of probable cause the relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of noncriminal acts.” *Gates*, 462 U.S. at 244 n.13.

## II. A DRUG-DETECTION DOG’S RELIABILITY IS ESTABLISHED BY ITS TRAINING

Because a drug-detection dog is trained to alert to the odor of drugs, the only way to evaluate the dog’s reliability is in a controlled setting where it can be definitively determined whether or not the dog’s alert occurred in the presence of such an odor. Evidence of unconfirmed alerts from the field, where such controls are not possible, is thus not necessary to a proper reliability

---

misconstrues the probable cause requirement. Absolute certainty is not required by the Fourth Amendment.”).



inquiry. To the contrary, such evidence will typically confuse, not inform, the inquiry into a dog's reliability.

**A. A Drug-Detection Dog's Reliability Is Established By Its Performance In Controlled Settings**

1. Although canine drug-detection training programs vary in their particulars, most are generally based on principles developed by U.S. Customs and Border Protection. See Bryson 261; see also U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot., *History of CBP Canine Centers* (2010), [http://www.cbp.gov/xp/cgov/border\\_security/canine/history\\_3.xml](http://www.cbp.gov/xp/cgov/border_security/canine/history_3.xml). These programs rely on the understanding that a "dog can be trained to respond consistently to certain sensory stimuli (odors, scents, and so forth) to alert the handler." U.S. Dep't of the Army, Pamphlet No. 190-12, *Military Working Dog Program 2* (1993) (*Military Working Dog Program*). "If the dog's reaction to selected stimuli is always rewarded by the handler, the reward reinforces the dog's behavior, motivating the dog to repeat the actions." *Ibid.* In training dogs to alert to drug odor, for example, the handler might give the dog a reward or reward object and put the dog in a sitting position every time it smells the target odor. See Edward E. Dean, Southwest Research Inst., *Training Dogs for Narcotic Detection 2* (1972) (Dean). If the handler fails to provide the reward when it sits to other odors, it will learn to discriminate between drug odors, which are followed by rewards, and all other odors, which are not. See *ibid.*

A controlled environment presents the only effective means of determining whether a dog that has undergone such training will reliably alert to drug odor (and only to such odor). Those who design evaluation exercises for contraband-detection dogs know where contraband is

hidden. They thus know the locations where the odor of the contraband will be present, as well as those locations where that odor should not be present. By correlating a dog's alerts and non-alerts to those known locations, the dog's reliability in detecting drug odors can be accurately assessed. See Bryson 256 ("Reliability means the dog will alert if he detects narcotic scent, not otherwise."); Kenneth G. Furton et al., Florida Int'l Univ., *The Scientific Working Group on Dog and Orthogonal Detector Guidelines* 55 (2010) (*Scientific Working Group*) (defining reliability as "[l]ow probability of alerting to anything other than a target odor and a high probability of alerting to a target odor").

By contrast, the handlers undergoing such evaluation exercises do not typically know where contraband is hidden, so they cannot inadvertently cue their dog. See, e.g., *Scientific Working Group* 42, 58, 64. A dog's record in controlled certification and training settings is thus the best response to the Florida Supreme Court's concern about handler cuing. See Pet. App. A32.

2. In the field, the situation is markedly different, and it is not possible to assess a dog's reliability in this way. If a dog fails to alert to a car or other location that in reality includes contraband, that failure may never be discovered because the location may not be searched. On the other hand, if a dog alerts to a location in which contraband is not ultimately found, "[i]t is impossible to know \* \* \* whether [the dog] detected the residual odor of an illegal drug (a correct alert, but not one that led to the successful recovery of evidence of drugs)" or whether the dog alerted in the absence of any drug odor at all. *Foster*, 252 P.3d at 301.

An alert in the field can fail to lead to recovery of drugs for a variety of reasons. The drugs could be so

well hidden that the searching officer does not find them. See *Scientific Working Group* 66. Drugs could have recently been in the location before being removed. See Bryson 257 (“Four skiers toke up in the parking lot before going up the mountain. Five minutes later a narcotic detector dog alerts to the car. There is no dope inside. However, the dog has performed correctly.”); *Military Working Dog Program* 30 (“The odor of a substance may be present in enough concentration to cause the dog to respond even after the substance has been removed. Therefore, when a detector dog responds and no drug or explosive is found, do not assume the dog has made an error.”). Individuals or items in the location might have recently been in close proximity to drugs. See *United States v. Diaz*, 25 F.3d 392, 395 (6th Cir. 1994) (dog alerted to suitcase where no drugs were found, but “the owner of the suitcase on which [the dog] had alerted admitted that she had been smoking ‘weed’ all weekend and that the scent could have remained in her clothing found in the suitcase”). Or the dog might have alerted in the absence of any drug odor.

Only the last situation amounts to a false positive; each of the others is an accurate alert. See Bryson 256 (a “false-positive alert” is when “the dog alerts where there is no drug *scent*”) (emphasis added). And when a dog alerts in the field but no drugs are found, it is typically not possible to definitively determine which of these explanations applies. See *Foster*, 252 P.3d at 301. Accordingly, an alert in the field that does not lead to recovery of drugs is not a false alert, but rather merely an “unconfirmed” one. *Scientific Working Group* 61-62 (“In a certification procedure you should know whether you have a false positive. You may not know whether you have a false positive in most operational situations.

An unconfirmed alert may also be an error—a false positive—but these outcomes cannot be distinguished in an operational environment.”); see *Ludwig*, 641 F.3d at 1252 n.5 (“[A]lerts in the field that ultimately reveal no discernible drugs are not necessarily false alerts.”) (brackets in original) (citation omitted); *Foster*, 252 P.3d at 296 (“On deployments in the field, when a dog alerts to a location and a subsequent search of that location does not result in the seizure of drugs or drug paraphernalia, there is no way to determine whether the dog alerted to a residual odor or whether the alert was a result of dog or handler error.”); see also *id.* at 301.

For these reasons, evidence about unconfirmed alerts in the field will typically hinder, not advance, the inquiry into a canine team’s reliability. For example, those field records may demonstrate that 58% of a particular dog’s alerts in the field lead to recovery of a seizable quantity of drugs, see *Ludwig*, 641 F.3d at 1252, but they likely will not be able to establish what happened in the remaining 42% of alerts. It is possible that most or all of those unconfirmed alerts were accurate, and their existence thus does not undermine the reliability of the dog. See *id.* at 1252 n.5. If, in contrast, the dog has a very low success rate in a controlled training or certification setting, in which all other explanations for a non-seizure alert can be eliminated, then the dog’s lack of reliability can be accurately established.

Accordingly, leading canine professionals do not consider unconfirmed alerts relevant to a dog’s reliability. The Scientific Working Group on Dog and Orthogonal Detector Guidelines (SWGDOG) is “a partnership of local, state, federal and international” law enforcement and other agencies formed to develop “best practices for



detection teams.” *Scientific Working Group* 3-4.<sup>6</sup> SWGDOG has issued guidelines expressly providing that the “[r]eliability of the canine/handler team shall be based upon the results of certification and proficiency assessments.” *Id.* at 66. Those guidelines further provide that, while “[c]onfirmed operational outcomes can be used to determine capability,” “[u]nconfirmed operational outcomes shall *not* be used to determine capability in that they do not correctly evaluate a canine/handler team’s performance (i.e. residual odor can be present or concealment may preclude discovery).” *Ibid.* (emphasis added); see *id.* at 106-107, 139.

Because training and certification are generally “the only evidence material to a determination that a particular dog is reliable,” testimony or records about the dog’s unconfirmed alerts in the field need not be produced to establish probable cause (and a defendant’s request for such records to support a suppression motion should typically be denied). *State v. Nguyen*, 811 N.E.2d 1180, 1194-1195 (Ohio Ct. App. 2004) (because “proof of the fact that a drug dog is properly trained and certified is the only evidence material to a determination that a particular dog is reliable,” trial court erred by “ordering the state to produce [the dog’s] real world reports”); see *People v. Stillwell*, 129 Cal. Rptr. 3d 233, 239 (Ct. App. 2011) (“California cases \* \* \* have not required evi-

---

<sup>6</sup> The National Institute of Justice, the Federal Bureau of Investigation, and the Department of Homeland Security provided funding to establish the working group in 2005. See *SWGDOG Update* 5-6 (Mar. 2010), [http://casgroup.fiu.edu/pages/docs/1060/1306436244\\_History\\_&\\_Goals\\_of\\_SWGDOG.pdf](http://casgroup.fiu.edu/pages/docs/1060/1306436244_History_&_Goals_of_SWGDOG.pdf). SWGDOG is one of more than a dozen similar scientific working groups “established to improve discipline practices and build consensus with federal, state, and local forensic community partners.” *Scientific Working Group* 9.

dence of a dog's success rate to establish probable cause.") (emphasis omitted); *Perkins v. State*, 685 S.E.2d 300, 304 (Ga. Ct. App. 2009) ("[W]e have rejected the argument that records of a drug dog's reliability are required to establish probable cause based on a dog's alert."); *Jones v. Commonwealth*, 670 S.E.2d 727, 733 & n.3 (Va. 2009) ("[T]he trial court properly held that the police department's failure to conduct back checks did not negate the dog's reliability"; such checks "are not necessarily a helpful way of determining whether a narcotics detection dog is reliable because the dogs alert to the odor of narcotics, not the presence of narcotics.").

The Florida Supreme Court thus erred by suppressing evidence on the ground that the State "did not introduce Aldo's field performance records so as to allow an analysis of the significance of the alerts where no contraband was found" and a "quantif[ication] [by the court of] Aldo's success rate in the field." Pet. App. A42, A42-A43 n.12.

3. The Florida Supreme Court incorrectly analogized detection dogs to human informants for purposes of establishing reliability. See Pet. App. A26-A28, A39-A40. The court reasoned that, just as the human informant's track record of success may be relevant to determining whether his tip will provide a basis for probable cause, the dog's track record in the field should be considered when evaluating whether its alert provides probable cause. *Id.* at A26 & n.7.

The analogy is flawed. Dogs are conditioned to respond automatically to a given stimulus and are not subject to human motivations and emotions. Cf. *Gates*, 462 U.S. at 234 (discussing probable cause inquiry when there is "doubt as to an informant's motives"). While an anonymous informant "has not placed his credibility at



risk” and thus may be able to “lie with impunity,” *Florida v. J.L.*, 529 U.S. 266, 275 (2000) (Kennedy, J., concurring), or may be “motivated by revenge,” *United States v. Marvin*, 720 F.2d 12, 13 (8th Cir. 1983), a dog does not engage in such decision-making calculus before it acts. Indeed, in *United States v. Jacobsen*, 466 U.S. 109 (1984), this Court compared detection dogs to a chemical field test for cocaine—an undisputedly scientific and reliable method of detection—and determined that neither constituted a search because both detect “only the presence or absence of narcotics.” *Id.* at 124 (quoting *United States v. Place*, 426 U.S. 696, 707 (1983)). “[A] positive alert from a law enforcement dog trained and certified to detect narcotics [is thus] inherently more reliable than an informant’s tip.” *State v. Cabral*, 859 A.2d 285, 300 (Md. Ct. Spec. App. 2004) (citation omitted); see *United States v. Meyer*, 536 F.2d 963, 966 (1st Cir. 1976) (Because “a canine, when trained, reacts mechanically to certain cues in his environment,” “[t]he same concerns that would be present in a human informant are simply not relevant here.”). Thus, while an informant’s track record may be relevant to determining his credibility, the same is not true for a dog.<sup>7</sup>

4. The logical flaw in the Florida Supreme Court’s focus on field alerts in which drugs are not found is well

---

<sup>7</sup> The Sixth Circuit has distinguished between a dog’s “reliability,” which the court said is conclusively established by its training and certification, and its “credibility,” which, in the court’s view, can be attacked by the dog’s field performance records and expert testimony. *Diaz*, 25 F.3d at 394. Application of a human concept like credibility to a dog is misplaced, and, for the reasons provided above, a dog’s field performance (no matter how denominated) is not necessarily probative of the dog’s abilities.

illustrated by *Wiggs v. State*, 72 So. 3d 154 (Fla. Dist. Ct. App. 2011). Applying the Florida Supreme Court's decision in this case, the intermediate appellate court in *Wiggs* ordered the suppression of cocaine found in the defendant's car after concluding that the dog whose alert led to the seizure was not reliable. See *id.* at 159-160. The dog in question had been trained and certified by the National Police Canine Association, meaning that it had achieved at least a 75% accuracy rate in detecting drug odor in controlled settings. See *id.* at 155-156. Yet the appellate court still conducted a searching review of the dog's field performance and deemed it unreliable. The dog had positively alerted in 14 out of 17 automobile stops, but drugs were found in only four of those cases. See *id.* at 157. Testimony and record evidence demonstrated that the dog's handler "had documented some type of narcotics history associated with each vehicle on which [the dog] alerted but in which no drugs were found," but the court dispatched that evidence as inadequate and ordered suppression. *Id.* at 159; see *id.* at 156-157 (describing evidence of episodes in which no drugs were recovered after an alert, such as a "passenger[s] admitt[ing] using cocaine," a "driver[s] admitt[ing] to smoking marijuana," and the officer's own detection of "the odor of burnt marijuana").

Judge Altenbernd specially concurred, agreeing that suppression was dictated by the Florida Supreme Court's decision in this case but emphasizing that "[i]t seems obvious that [the dog] is alerting on residual drugs that do not lead to the discovery of arrestable quantities of drugs." *Wiggs*, 72 So. 3d at 161. As the concurring judge explained, "[i]t is not that [the dog] is alerting when there are no drugs to smell; he is alerting

to molecules of drugs left behind in vehicles where drugs have been used or transported." *Ibid.*

Thus, in *Harris*, the court is requiring that law enforcement train dogs to distinguish between the odor of minute quantities of drugs and larger quantities of drugs. If that cannot be done for a particular drug, it seems we will need to abandon dogs as a method of obtaining probable cause for that drug.

*Ibid.*<sup>8</sup>

#### **B. Courts Should Not Constitutionalize Canine Training Or Certification Standards**

If a dog successfully completed a bona fide training program or it was certified by a bona fide certifying organization, see p. 16, *supra*, and it alerts in accordance with its training, a court should find its alert reliable. Courts can presume that a trained or certified dog that is used by law enforcement reliably alerts to the presence of odors it is trained to recognize and need not ex-

---

<sup>8</sup> As Judge Altenbernd observed, the Florida Supreme Court's analysis of residual odor suggests that drug-detection dogs should be trained to disregard weak drug odors. See *Wiggs*, 72 So. 3d at 161. But any attempt to train a dog to ignore weak odors in the hope of eliminating alerts to residual odor would defeat the purpose of using such dogs, which is to take advantage of their superior sense of smell to detect minute quantities of target substances that may be skillfully hidden and masked. See Dean 28-29; see also J.M. Johnston, Institute for Biological Detection Sys., Auburn Univ., *Canine Detection Capabilities: Operational Implications of Recent R&D Findings* 2 (June 1999) ("All detection tasks require that dogs respond to the lowest detectable concentrations of the target odor because it is such initial samples that can then prompt them to move in directions that lead to higher concentrations. \* \* \* It is \* \* \* important that all dogs are trained to pay attention to a range of concentrations, including even the faintest whiff of target odors, regardless of differences in search scenarios.").

amine the technical adequacy of training or certification standards as part of a probable cause inquiry. See *United States v. Sanchez-Pena*, 336 F.3d 431, 444 & n.62 (5th Cir. 2003). The Florida Supreme Court's apparent requirement that such an examination be undertaken, see, *e.g.*, Pet. App. A41, is unnecessary, would inappropriately constitutionalize dog training methodology, and would have adverse consequences.

First, law enforcement has a strong interest in ensuring the accuracy of contraband-detection dogs and thus has its own independent incentives to establish and maintain effective training and certification programs. See Bryson 261 ("Since high quality proficiency training is critical to performance reliability, its importance cannot be overemphasized.") (emphasis omitted). A dog that fails to alert to the presence of an odor it is trained to detect could lead to the failure to recover drugs or to detect explosives. Likewise, a dog that alerts in the absence of target odors will squander limited law enforcement resources by triggering searches unlikely to yield evidence of illegal activity. Courts can themselves presume that law enforcement would not rely on a dog unless the dog's certification or training renders it a reliable source of information.

Second, the Florida Supreme Court's approach would inappropriately turn suppression hearings involving dog alerts into lengthy "mini-trial[s]" on technical training methods and undermine certainty for officers in the field who reasonably rely on the fact of successful training as establishing their dogs' reliability. *United States v. Robinson*, 390 F.3d 853, 874-875 (6th Cir. 2004). While a court conducting a suppression hearing may consider whether the program or organization through which a detection dog was trained or certified

is bona fide, see *Ludwig*, 641 F.3d at 1251 (courts should accept training absent a showing that it was conducted by a “sham” organization), such an inquiry should not extend beyond determining whether the program or organization is one upon which law enforcement officers generally rely.<sup>9</sup>

Third, while the basic reward-response principles underlying the training of detection dogs are well-understood, see p. 16, *supra*, canine professionals use a variety of methods both to apply those principles in training and to measure the success of those methods. See, e.g., *Scientific Working Group* 19-20 (summarizing different organizations’ certification standards).<sup>10</sup> Contrary to the Florida Supreme Court’s view (Pet. App. A45), the lack of complete uniformity does not undermine the reliability of trained drug-detection dogs. Moreover, courts are not well-equipped to evaluate the

---

<sup>9</sup> Similarly, an affidavit supporting a search warrant based on a drug-detection dog’s alert need not include background information about a program or organization that conducted the training or certification. See *United States v. Berry*, 90 F.3d 148, 153 (6th Cir.) (affidavit referred to “drug sniffing or drug detecting dog”; court concluded that phrase “reasonably implied that the dog was a ‘trained narcotics dog’” and found the affidavit sufficient), cert. denied, 519 U.S. 999 (1996); *Meyer*, 536 F.2d at 965-966 (affidavit describing detection dog as “trained” was sufficient).

<sup>10</sup> Law enforcement at all levels has collaborated in a scientific working group to develop and promote a set of training and certification guidelines for drug-detection dogs. See generally *Scientific Working Group* 1-23, 134-139; see also pp. 19-20 & n.6, *supra*. Those involved in that endeavor “anticipate that SWGDOG will have a broad and positive impact on policy and practice” with respect to canine training and certification nationally. *Scientific Working Group* 22. Although SWGDOG anticipates increasing uniformity in training and certification standards as a result of its efforts, see *ibid.*, differences remain, see *id.* at 19-20.



technical validity of these varying standards, see *Ludwig*, 641 F.3d at 1251, and they should not use the Fourth Amendment as a vehicle for freezing any of them into place.

**C. Officers Need A Clear Rule To Guide Decisions In The Field**

Law enforcement agents conducting automobile searches, often on the side of a busy highway, operate in a dynamic environment in which “the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and [thus] the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.” *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Such circumstances call for “clear and unequivocal guidelines to the law enforcement profession.” *California v. Acevedo*, 500 U.S. 565, 577 (1991) (internal quotation marks and citation omitted).

That principle is fully applicable here. “[A] dog’s credentials provide a bright-line rule for when officers may rely on the dog’s alerts—a far improvement over requiring them to guess whether the dog’s performance will survive judicial scrutiny after the fact.” *Ludwig*, 641 F.3d at 1251. It is exactly the type of “readily administrable rule[]” this Court has repeatedly endorsed in the Fourth Amendment context. *Virginia v. Moore*, 553 U.S. 164, 175 (2008) (quoting *Atwater*, 532 U.S. at 347). By contrast, relying on a detection dog’s field performance would seemingly require police to conduct a calculation each time they deploy a particular dog in order to “quantify[] [the dog’s] success rate in the field”



and determine whether the resulting figure is adequate for probable cause. Pet. App. A42 & n.12; see *Wiggs*, 72 So. 3d at 161 (Altenbernd, J., specially concurring) (expressing concern about “uncertainty” for law enforcement officers caused by the Florida Supreme Court’s decision in this case). Any such shifting standards for particular dogs would be wholly unworkable.

A rule that a detection dog’s reliability should be evaluated based on its successful completion of training, rather than its quantified field performance, does not mean that an officer’s testimony that a trained dog alerted will invariably establish probable cause. A court weighing suppression may consider testimony that the handler cued the dog to alert in the particular case before it, *e.g.*, *Phelps v. State*, No. S-11-0215, 2012 WL 2306407, at \*10-\*11 (Wyo. June 19, 2012), or that the dog did not in fact alert, *e.g.*, *United States v. Parada*, 577 F.3d 1275, 1281 (10th Cir. 2009), cert. denied, 130 S. Ct. 3321 (2010); *State v. Nguyen*, 726 N.W.2d 871, 878-884 (S.D. 2007). A court may also consider evidence that “the alerting dog has some sort of ailment or impairment” that would have hindered its ability to detect drug odor. *United States v. Howard*, 621 F.3d 433, 448 (6th Cir. 2010), cert. denied, 131 S. Ct. 1623 (2011); see *Foster*, 252 P.3d at 301-302 n.12 (“[O]n a proper record, a handler’s awareness of a medical condition or other infirmity that could affect the dog’s reliability would be relevant to the probable cause analysis.”). Those case-specific inquiries go to the particular circumstances of the alert, not to the general capacity of the dog to reliably detect the odor of contraband.

### III. THE DRUG-DETECTION DOG'S ALERT PROVIDED PROBABLE CAUSE TO SEARCH RESPONDENT'S TRUCK

Aldo's alert provided Officer Wheatley probable cause to search respondent's truck. Officer Wheatley and Aldo had both completed extensive courses before they began working together in 2005, and they completed another week-long course thereafter. J.A. 53-55. In addition, Aldo had been certified for successfully detecting marijuana, methamphetamine, heroin, ecstasy, and both crack and powder cocaine, indicating that he is capable of so doing with a high degree of accuracy. J.A. 55, 70, 103-104. Respondent has not contended that any of the relevant training or certification programs was not bona fide. In addition, Officer Wheatley also conducted weekly maintenance training with Aldo in various settings. J.A. 56-60.

Aldo's success in controlled training settings established his reliability, and there was no need to introduce records of his field performance. And the later episode in which Aldo alerted to respondent's door handle but no drugs were discovered, J.A. 44-50, 75-77, was likely not a false alert, given respondent's admissions of frequent drug preparation and use. In any event, "[t]he crucial question for reliability is not whether a dog is actually correct in the specific instance at hand—no dog is infallible—but rather whether the dog is likely enough to be right so that a positive alert 'is sufficient to establish probable cause for the presence of a controlled substance.'" *United States v. Stubblefield*, No. 10-3587, 2012 WL 2290870, at \*4 (6th Cir. June 19, 2012) (quoting *Diaz*, 25 F.3d at 394). That standard was met in this case.

**CONCLUSION**

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.  
*Solicitor General*

LANNY A. BREUER  
*Assistant Attorney General*

MICHAEL R. DREEBEN  
*Deputy Solicitor General*

JOSEPH R. PALMORE  
*Assistant to the Solicitor  
General*

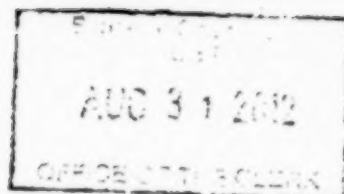
SONJA M. RALSTON  
*Attorney*

JULY 2012

**AMICUS  
CURIAE  
BRIEF**

20000-  
APR  
10:00 PM

No. 11-817



---

IN THE  
**Supreme Court of the United States**

---

STATE OF FLORIDA,

*Petitioner,*

v.

CLAYTON HARRIS,

*Respondent.*

---

On Writ of Certiorari to  
The Supreme Court of Florida

---

**BRIEF OF AMICUS CURIAE ELECTRONIC  
PRIVACY INFORMATION CENTER (EPIC)  
IN SUPPORT OF THE RESPONDENT**

---

MARC ROTENBERG  
*Counsel of Record*  
ALAN BUTLER  
KHALIAH BARNES  
ELECTRONIC PRIVACY  
INFORMATION CENTER (EPIC)  
1718 Connecticut Ave. NW  
Suite 200  
Washington, DC 20009  
(202) 483-1140

August 31, 2012

---

## QUESTION PRESENTED

Whether an investigative technique that law enforcement asserts reliably identifies the presence of contraband is sufficient to satisfy the probable cause requirement of the Fourth Amendment and thereby allows routine warrantless searches.



## TABLE OF CONTENTS

|                                                                                                                                                                         |    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| QUESTION PRESENTED .....                                                                                                                                                | i  |
| TABLE OF CONTENTS .....                                                                                                                                                 | ii |
| INTEREST OF THE <i>AMICUS CURIAE</i> .....                                                                                                                              | 1  |
| SUMMARY OF THE ARGUMENT .....                                                                                                                                           | 3  |
| ARGUMENT .....                                                                                                                                                          | 4  |
| I. The Government's Burden of Reliably<br>Establishing Probable Cause Is Essential to<br>the Preservation of Electronic Privacy:.....                                   | 4  |
| II. A Probable Cause Finding Under the Fourth<br>Amendment Should Be Established Based on<br>Reliable Evidence .....                                                    | 6  |
| A. The Fourth Amendment Protects<br>Individual Privacy by Prohibiting<br>Unreasonable Searches and Seizures .....                                                       | 7  |
| B. In Order to Establish Probable Cause<br>Based on the Use of an Investigative<br>Technique, a Court Should Consider<br>Whether the Technique Is Reliable.....         | 10 |
| III. New Investigative Techniques Should Be<br>Used Based on Research, Testing, and Data<br>Indicating Reliability .....                                                | 10 |
| A. The National Academy of Sciences and<br>Other Experts Have Raised Significant<br>Concerns About the Lack of Reliable<br>Standards for Investigative Techniques ..... | 12 |

|                                                                                                                                    |           |
|------------------------------------------------------------------------------------------------------------------------------------|-----------|
| B. New Forensic Techniques Demonstrate the<br>Ongoing Problem of Inadequate Testing<br>and Evaluation .....                        | 19        |
| 1. Terahertz Scanners Generate False<br>Positives Based on Trace Amounts and<br>Interference Can Cause Unreliable<br>Results ..... | 21        |
| 2. Airport "Body Scanners" Are Not<br>Designed to Identify the Contraband<br>the Agency Claims They Detect .....                   | 24        |
| 3. Digital Intercept Devices Overcollect<br>Communications Data .....                                                              | 27        |
| <b>CONCLUSION .....</b>                                                                                                            | <b>30</b> |

## TABLE OF AUTHORITIES

### CASES

|                                                                                                                                                                           |            |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
| <i>Arizona v. Evans</i> , 514 U.S. 1 (1995) (O'Connor, J., concurring).....                                                                                               | 2, 10      |
| <i>Bond v. United States</i> , 529 U.S. 334 (2000) .....                                                                                                                  | 7          |
| <i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> ,<br>509 U.S. 579 (1993) .....                                                                                        | 14, 15     |
| <i>Harris v. State</i> , 71 So.3d 756 (Fla. 2011) .....                                                                                                                   | 14, 18     |
| <i>Herring v. United States</i> , 555 U.S. 135 (2009) .....                                                                                                               | 19         |
| <i>Illinois v. Caballes</i> , 543 U.S. 405 (2005).....                                                                                                                    | passim     |
| <i>Illinois v. Gates</i> , 462 U.S. 213 (1983) .....                                                                                                                      | 10, 19     |
| <i>Katz v. United States</i> , 389 U.S. 347 (1967)<br>(Harlan, J., concurring) .....                                                                                      | 7          |
| <i>Kyllo v. United States</i> , 533 U.S. 27 (2001) .....                                                                                                                  | 8, 9       |
| <i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305<br>(2009) .....                                                                                                      | 13, 24, 28 |
| <i>Safford Unified School Dist. No. 1 v. Redding</i> ,<br>557 U.S. 364 (2009) .....                                                                                       | 10         |
| <i>United States v. \$242,484.00</i> , 351 F.3d 499<br>(11th Cir. 2003), <i>vacated on other grounds by</i><br><i>reh'g en banc</i> , 357 F.3d 1225 (11th Cir. 2004)..... | 9          |
| <i>United States v. Place</i> , 462 U.S. 696 (1983).....                                                                                                                  | 4, 6, 7    |

### STATUTES

|                                                                                                                                             |        |
|---------------------------------------------------------------------------------------------------------------------------------------------|--------|
| 18 U.S.C. § 3123(a)(3) .....                                                                                                                | 28, 29 |
| The Science, State, Justice, Commerce, and<br>Related Agencies Appropriations Act of 2006.<br>P.L. No. 109-108, 119 Stat. 2290 (2005) ..... | 13     |

## CONSTITUTIONAL PROVISIONS

|                             |   |
|-----------------------------|---|
| U.S. Const. amend. IV ..... | 8 |
|-----------------------------|---|

## OTHER AUTHORITIES

|                                                                                                                                                                                                                                                                                                                                                               |        |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| Al Baker, <i>Police Working on Technology to Detect Concealed Guns</i> , N.Y. Times (Jan. 17, 2012) .....                                                                                                                                                                                                                                                     | 22     |
| Andre A. Moenssens, <i>Novel Scientific Evidence in Criminal Cases: Some Words of Caution</i> , 84 J. Crim. L. & Crimonology 1 (1993) .....                                                                                                                                                                                                                   | 16     |
| <i>BomDetec – Phase I Preliminary Design Review Report</i> , submitted by Gordon-CenSSiS, Nat'l Sci. Found. Research Ctr., to the Homeland Sec. Advanced Research Projects Agency of the Dep't of Homeland Sec. in response to Prototypes and Technology for Improvised Explosives Device Detection (PTIEDD) Broad Agency Announcement 05-05 (BAA 05-03)..... | 21, 23 |
| Brandon L. Garret & Peter J. Neufeld, <i>Invalid Forensic Science Testimony and Wrongful Convictions</i> , 95 Va. L. Rev. 1 (2009) .....                                                                                                                                                                                                                      | 16     |
| Brief for the Int'l Assn. of Arson Investigators, <i>Mich. Millers Mutual Ins. Co. v. Benfield</i> , 140 F.3d 915 (11th Cir. 1998).....                                                                                                                                                                                                                       | 15     |
| Cecil J. Hunt, II, <i>Calling in the Dogs: Suspicionless Sniff Searches and Reasonable Expectations of Privacy</i> , 56 Case W. Res. L. Rev. 285 (2005) .....                                                                                                                                                                                                 | 9      |

|                                                                                                                                                                                                                                                 |        |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| Comm'n on Assessment of Sec. Tech. for<br>Transp., National Academy of Sciences,<br><i>Assessment of Millimeter-Wave and<br/>Terahertz Technology for Detection and<br/>Identification of Concealed Explosives and<br/>Weapons</i> (2007) ..... | 25     |
| D. Michael Risinger et al., <i>The Daubert/Kumho<br/>Implications of Observer Effects in Forensic<br/>Science: Hidden Problems of Expectation and<br/>Suggestion</i> , 90 Cal. L. Rev. 1 (2002) .....                                           | 16     |
| Daniel L. Steinbock, <i>Data Matching, Data<br/>Mining, and Due Process</i> , 40 Ga. L. Rev. 1<br>(2005) .....                                                                                                                                  | 8      |
| Fed. Bureau of Investigation, U.S. Dep't of<br>Justice, <i>Scientific Working Group on Dogs and<br/>Orthogonal Detection Guidelines</i> , 8 Forensic<br>Science Comm. (Oct. 2006) .....                                                         | 11, 18 |
| IIT Research Inst., <i>Independent Technical<br/>Review of the Carnivore System: Final Report</i><br>(2000) .....                                                                                                                               | 28     |
| Ikufumi Katayama & Masaaki Ashida,<br><i>Broadband Terahertz Spectroscopy and Its<br/>Application to the Characterization of Thin<br/>Films</i> , 53 J. Vacuum Soc'y 301 (2010) .....                                                           | 21     |
| <i>Improving Forensic Science in the Criminal<br/>Justice System: Hearing Before the S. Comm.<br/>on the Judiciary</i> , 112th Cong. (2012)<br>(statement of Sen. Patrick Leahy, Chairman,<br>S. Comm. on the Judiciary) .....                  | 12     |

|                                                                                                                                                                                                                                                                                                                 |           |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| <i>Internet and Data Interception Capabilities<br/>Developed by FBI: Hearing Before the<br/>Subcomm. on the Constitution of the H.<br/>Comm. on the Judiciary, 106th Cong. (2000)<br/>(statement of Donald M. Kerr, Assistant<br/>Director, Laboratory Division, Federal Bureau<br/>of Investigation) .....</i> | <i>27</i> |
| <i>James W. Osterburg, A Commentary on Issues<br/>of Importance in the Study of Investigation<br/>and Criminalistics, 11 J. Forensic Sci. 261<br/>(1966) .....</i>                                                                                                                                              | <i>15</i> |
| <i>Jennifer L. Mnookin et al., The Need for a<br/>Research Culture in the Forensic Sciences, 58<br/>UCLA L. Rev. 725 (2011) .....</i>                                                                                                                                                                           | <i>17</i> |
| <i>Jennifer L. Mnookin, The Courts, the NAS, and<br/>the Future of Forensic Science, 75 Brook. L.<br/>Rev., no. 4, at 1 (2009) .....</i>                                                                                                                                                                        | <i>16</i> |
| <i>Jess McNally, Terahertz Detectors Could See<br/>Through Your Clothes From a Mile Away,<br/>Wired (July 12, 2010) .....</i>                                                                                                                                                                                   | <i>22</i> |
| <i>Jingle Liu et al., Broadband Terahertz Wave<br/>Remote Sensing Using Coherent<br/>Manipulation of Fluorescence from<br/>Asymmetrically Ionized Gases, 4 Nature<br/>Photonics 627 (2010) .....</i>                                                                                                            | <i>23</i> |
| <i>John J. Lentini, 'Progress' in Fire Investigation:<br/>Moving from Witchcraft and Folklore to the<br/>Misuse of Models and the Abuse of Science,<br/>4th Int'l Symp. on Fire Investigation Sci. &amp;<br/>Tech. (2010) .....</i>                                                                             | <i>16</i> |



|                                                                                                                                                                      |        |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| Joseph L. Peterson & Anna S. Leggett, <i>The Evolution of Forensic Science: Progress Among the Pitfalls</i> , 36 Stetson L. Rev. 621 (2007) .....                    | 16     |
| Julian Sanchez, <i>The Pinpoint Search</i> , Reason (Jan. 2007) .....                                                                                                | 20     |
| Keith Wagstaff, <i>Police Developing Tech to Virtually Frisk People from 82 Feet Away</i> , TIME (Jan. 20, 2012) .....                                               | 22     |
| Kodo Kawase et al., <i>Non-destructive Terahertz Imaging of Illicit Drugs Using Spectral Fingerprints</i> , 11:20 Optics Express 2550 (2003) .....                   | 24     |
| Learned Hand, <i>Historical and Practical Considerations Regarding Expert Testimony</i> , 15 Harv. L. Rev. 40 (1901) .....                                           | 15     |
| Leon Kauffman & Joeseeph W. Carlson, <i>An Evaluation of Airport X-ray Backscatter Units Based on Image Characteristics</i> , 4 J. Transp. Sec. 73 (2011) .....      | 26     |
| Mark E. Smith, <i>Going to the Dogs: Evaluating the Proper Standard for Narcotic Detector Dog Searches of Private Residences</i> , 46 Hous. L. Rev. 103 (2009) ..... | 8      |
| Mark Marchand, <i>A Revolutionary Breakthrough in Terahertz Remote Sensing</i> , Rensselaer Polytechnic Institute (July 12, 2010) .....                              | 23     |
| Markus Walther et al., <i>Chemical Sensing and Imaging with Pulsed Terahertz Radiation</i> , 397 Analytical & Bioanalytical Chemistry 1009 (2010) .....              | 21, 22 |

|                                                                                                                                                                                                    |                    |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| National Research Council of the National Academies, <i>Strengthening Forensic Science in the United States: A Path Forward</i> (2009) .....                                                       | 11, 13, 14, 15, 18 |
| Orin Kerr, <i>Internet Surveillance Law After the USA PATRIOT Act: The Big Brother That Isn't</i> , 97 Nw. U. L. Rev. 607 (2003) .....                                                             | 28                 |
| Orin Kerr, <i>Searches and Seizures in the Digital World</i> , 119 Harv. L. Rev. 531 (2005).....                                                                                                   | 7                  |
| Paul C. Giannelli, <i>'Junk Science': The Criminal Cases</i> , 84 J. Crim. L. & Crimonology 105 (1993) .....                                                                                       | 16, 17             |
| Paul C. Giannelli, <i>Forensic Science</i> , 33 J. L., Medicine, & Ethics 535 (2005) .....                                                                                                         | 16                 |
| Peter W. Huber, <i>Galileo's Revenge: Junk Science in the Courtroom</i> (Basic Books 1993)                                                                                                         | 16, 16             |
| Roger N. Clark, U.S. Geological Survey, <i>Chapter 1: Spectroscopy of Rocks and Minerals, and Principles of Spectroscopy</i> (1999) .....                                                          | 22                 |
| Ronald Ulbricht et al., <i>Carrier Dynamics in Semiconductors Studied with Time-Resolved Terahertz Spectroscopy</i> , 83 Rev. Mod. Phys. 543 (2011) .....                                          | 21                 |
| S. Kong & D. Wu, <i>Terahertz Time-Domain Spectroscopy for Explosive Trace Detection</i> , CIHSPS – IEEE Int'l Conf. on Computational Intelligence for Homeland Sec. & Personal Safety (2006)..... | 24                 |
| Scientific Working Group on Dog and Orthogonal Detector Guidelines, <i>SWGDOG SC2 – General Guidelines</i> (1st Rev. 2009).....                                                                    | 18                 |

|                                                                                                                                                                                                                                                                                  |       |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| Scott J. Glick, <i>Virtual Checkpoints and Cyber-Terry Stops: Digital Scans to Protect the Nation's Critical Infrastructure and Key Resources</i> , 6 J. Nat'l Sec. L. & Pol'y 97 (2012) .....                                                                                   | 7     |
| Staff of H. Comm. on Oversight and Gov't Reform & H. Comm. on Transp. and Infrastructure, 112th Congress, <i>Airport Insecurity: The TSA's Failure to Effectively Procure, Deploy and Warehouse Its Screening Technologies</i> , (Comm. Print 2012) .....                        | 27    |
| <i>Strengthening Forensic Science in the United States: Hearing Before the S. Comm. on the Judiciary</i> , 111th Cong. (2009) (testimony of Professor Paul Giannelli, Case Western Reserve University) .....                                                                     | 17    |
| Timothy C. MacDonnell, <i>Orwellian Ramifications: The Contraband Exception to the Fourth Amendment</i> , 41 U. Mem. L. Rev. 299 (2010) .....                                                                                                                                    | 8, 20 |
| Transp. Sec. Admin., U.S. Dep't of Homeland Sec., <i>Procurement Specification for Whole Body Imager Devices for Checkpoint Operations</i> , Sept. 23, 2008.....                                                                                                                 | 26    |
| <i>TSA Oversight Part IV: Is TSA Effectively Procuring, Deploying, and Storing Aviation Security Equipment and Technology? Joint Hearing Before the H. Comm. on Oversight and Government Reform and the Comm. on Transportation and Infrastructure</i> , 112th Cong. (2012)..... | 26    |
| U.S. Dep't of Homeland Sec., <i>Budget-in-Brief Fiscal Year 2006</i> (Feb. 7, 2005) .....                                                                                                                                                                                        | 24    |

|                                                                                                                                                                                       |    |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| <i>U.S. Gov't Accountability Office, GAO-12-541T, Transportation Security Administration: Progress and Challenges Faced in Strengthening Three Key Security Programs (2012)</i> ..... | 26 |
| William C. Thompson, <i>Evaluating the Admissibility of New Forensic Tests: Lessons from the 'DNA War'</i> , 84 J. Crim. L. & Crimonology 22 (1993) .....                             | 16 |
| Xi-Cheng Zhang & Jingzhou Xu, <i>Introduction to THz Wave Photonics</i> (Springer 2010) .....                                                                                         | 21 |

## INTEREST OF THE *AMICUS CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.<sup>1</sup>

EPIC has participated as *amicus curiae* before this Court and many other courts in matters concerning new challenges to Fourth Amendment protections. *See, e.g., United States v. Jones*, 132 S. Ct. 945 (2012); *NASA v. Nelson*, 131 S. Ct. 746 (2011); *Tolentino v. New York*, 131 S. Ct. 1387 (2011); *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619 (2010); *Herring v. United States*, 555 U.S. 135 (2009); *Hiibel v. Sixth Judicial Circuit of Nev.*, 542 U.S. 177 (2004); *In re US for Historical Cell Site Data*, 747 F. Supp. 2d 827 (2010), *appeal docketed*, No. 11-20884 (5th Cir. Dec. 14, 2011); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2005); and, *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004).

At issue in this case is whether an alert by a narcotics detection dog, absent additional evidence of reliability, is sufficient to establish probable cause for

---

<sup>1</sup> Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

the warrantless search of a vehicle. As the outcome in this case may also implicate the use of investigative techniques that encroach upon electronic privacy, EPIC supports the judgment of the Florida Supreme Court, and urges the Court to reconsider the viability of the "sui generis" analysis, *see United States v. Place*, 462 U.S. 696 (1983), that would effectively place many similar techniques outside the scope of the Fourth Amendment. The police are now deploying a wide range of techniques, functionally similar to the canine sniff at issue in this case, that raise substantial concerns about the future application of the Fourth Amendment. As Justice O'Connor cautioned in *Arizona v. Evans*, "[t]he police, of course, are entitled to enjoy the substantial advantages this technology confers. They may not, however, rely on it blindly. With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities." 514 U.S. 1, 17-18 (1994) (O'Connor, J., concurring). In making this assessment, the Court should consider the reliability of the technique, the impact upon privacy, and the purpose of the Fourth Amendment.



## SUMMARY OF THE ARGUMENT

When a new investigative technique is used in an attempt to identify a hidden substance, flag a possible threat, or gather evidence, the government should bear the burden of establishing its reliability. Otherwise, impermissible searches will result. This problem is particularly acute with search techniques – call them “electronic canine sniffs” – that implicate privacy.

The Court has previously considered whether an alert from a detection dog is itself a search, but it has not determined whether such an alert is sufficiently reliable to establish probable cause for a search. There is a clear need now to look more closely at techniques that purport to reliably detect only contraband. Since the decision in *Illinois v. Caballes*, 543 U.S. 405 (2005), forensic sciences have come under increased scrutiny. Scientific experts and legal scholars have urged more extensive evaluation of new investigative techniques, and the development of national standards, in order to support legal conclusions.

The rapid development of new investigative techniques poses a significant threat to electronic privacy and the rights of individuals. Many techniques may turn out to be useful, but all investigative techniques should be subject to close scrutiny by the courts. The “perfect search,” like the “infallible dog,” is a null set.

## ARGUMENT

### I. The Government's Burden of Reliably Establishing Probable Cause Is Essential to the Preservation of Electronic Privacy

This case presents a key Fourth Amendment concern: what evidence is necessary to establish the reliability of a method used to support a finding of probable cause? This question follows from the long and complicated history of searches enabled by drug detection canines. The Court assumed in *United States v. Place*, 462 U.S. 696 (1983), that the use of a trained dog “does not expose noncontraband items that otherwise would remain hidden from public view.” *Id.* at 707. The Court reaffirmed that view in *Illinois v. Caballes*, 543 U.S. 405 (2005), but Justice Souter observed in dissent that “[a]t the heart both of *Place* and the Court’s opinion today is the proposition that sniffs by a trained dog are *sui generis* because a reaction by the dog in going alert is a response to nothing but the presence of contraband.” *Id.* at 410-11 (Souter, J., dissenting). As Justice Souter stated, and *amicus* EPIC believes to be true for a broad class of new investigative techniques, “[t]he infallible dog, however, is a creature of legal fiction.” *Id.* at 411.

The deployment of electronic investigative techniques raises concerns very similar to the use of the detection dog in this case. A warrantless search conducted subsequent to an “alert” from a detection dog or similar technique will implicate Fourth Amendment interests. An unreliable and untested technique could generate false positives, alerts where there is no contraband present, which would lead to

invasive searches of innocent individuals. There are several examples of recently developed techniques that an agent might use in an attempt to detect contraband, but these techniques should not be used without testing and verification.

Imagine that the officer in this case did not rely on an "alert" by Aldo, the drug-detection dog, but instead on an "alert" by a new spectroscopic device used to identify unique chemical signatures from a distance. *See, infra* at Part III.B.1. Would the Court assume that information generated by such a device was reliable? Could the Court find that probable cause existed to search defendant's truck absent such proof? Imagine, alternatively, that the officer relied on an "alert" by a device that could peer under a person's clothing and observe and record images that would not otherwise be viewable by the police. Could the officer rely on that alert without first establishing the effectiveness of the device? And what of the substantial privacy intrusion that would result if such searches were routinely permitted without the accountability that the Fourth Amendment requires? *See, infra* at Part III.B.2. Similarly, imagine the agents use a network device to intercept private communications that they believe may contain evidence of illegal conduct. Such a technique could conceivably scan and record millions of private messages to find a needle in the digital haystack. Could the agent use the intercepted communications without first establishing the accuracy of the technique used to identify the illegal communications? *See, infra*, at Part III.B.3. Because the answer to all of these questions is clearly *no*, the

Court should uphold the decision of the Florida Supreme Court and require independent evidence of reliability where an officer uses an investigative technique to establish probable cause or otherwise justify an unwarranted search.

## **II. A Probable Cause Finding Under the Fourth Amendment Should Be Established Based on Reliable Evidence**

In prior cases involving the use of narcotics detection dogs, this Court has held that probable cause was not required to conduct a “sniff test” in certain public spaces. *See Illinois v. Caballes*, 543 U.S. 405 (2005) (exterior of a vehicle during a traffic stop); *United States v. Place*, 462 U.S. 696 (1983) (luggage at an airport). These decisions were characterized as *sui generis* based on the Court’s conclusion that a canine sniff “discloses only the presence or absence of narcotics, a contraband item.” *Caballes*, 543 U.S. at 409. However, Justice Souter cautioned in *Caballes* that “[w]hat we have learned about the fallibility of dogs in the years since *Place* was decided would itself be reason to call for reconsidering *Place*’s decision against treating the intentional use of a trained dog as ~~a search~~.” *Id.* at 410 (Souter, J., dissenting).

As the facts of this case show, many investigative techniques do not reliably indicate the presence of a contraband substance. The Fourth Amendment protects individuals against such “unreasonable searches and seizures,” and this Court has held that procedural requirements, such as proof of probable cause, help ensure that individual rights are not violated.

### **A. The Fourth Amendment Protects Individual Privacy by Prohibiting Unreasonable Searches and Seizures**

The Fourth Amendment protects individuals against “government intrusion[s] that upse[t] an . . . ‘expectation of privacy’ that is objectively ‘reasonable.’ ” *Bond v. United States*, 529 U.S. 334, 340 (2000) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). An individual has a reasonable expectation of privacy when (1) that individual manifests a subjective expectation of privacy, and (2) society recognizes that expectation as “reasonable.” See *Katz* 389 U.S. at 360-61 (Harlan, J., concurring). To conduct investigations in such circumstances, law enforcement officials must first obtain a warrant supported by probable cause or invoke an exception to the Fourth Amendment’s warrant clause. See Orin Kerr, *Searches and Seizures in the Digital World*, 119 Harv. L. Rev. 531, 547 (2005).

The Court has ruled that a dog sniff test conducted in certain public areas does not constitute an unreasonable search under the Fourth Amendment. See *Place*, 462 U.S. 696; *Caballes*, 543 U.S. 405. However, since the ruling in *Caballes*, the reliability of investigative techniques and forensic methods has been widely criticized. See *infra* Part III.A. In addition, legal scholars have raised significant concerns about the potential applicability of the “contraband exception” to the search of digital media. See, e.g., Scott J. Glick, *Virtual Checkpoints and Cyber-Terry Stops: Digital Scans to Protect the Nation’s Critical Infrastructure and Key Resources*, 6 J. Nat’l Sec. L. & Pol’y 97 (2012); Timothy C.



MacDonnell, *Orwellian Ramifications: The Contraband Exception to the Fourth Amendment*, 41 U. Mem. L. Rev. 299 (2010); Mark E. Smith, *Going to the Dogs: Evaluating the Proper Standard for Narcotic Detector Dog Searches of Private Residences*, 46 Hous. L. Rev. 103 (2009); Daniel L. Steinbock, *Data Matching, Data Mining, and Due Process*, 40 Ga. L. Rev. 1 (2005).

The Court previously addressed the use of new investigative techniques designed to detect the presence of contraband in *Kyllo v. United States*, 533 U.S. 27 (2001). The Court found that a search occurs where a device enables the Government “to explore details of the home that would previously have been unknowable without physical intrusion.” *Id.* at 40. Justice Scalia, writing for the Court, also noted that the issue before the Court was somewhat broader, “[t]he question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.” *Id.* at 34.

The same is true of investigative techniques that reveal the contents of a private space without establishing a traditional predicate for a search based on probable cause. The unreliability of a canine sniff not only implicates warrantless searches that produce contraband, but also warrantless searches of innocuous “persons, houses, papers, and effects.” U.S. Const. amend. IV. Like the thermal-imaging device in *Kyllo*, a canine sniff cannot be classified as investigative tool that only reveals the presences or absence of contraband. See Cecil J. Hunt, II, *Calling in the Dogs: Suspicionless Sniff Searches and*



*Reasonable Expectations of Privacy*, 56 Case W. Res. L. Rev. 285, 335 (2005).

A canine sniff test could produce a false alert, for example, in the presence of an innocent person based on the scent of trace drug particles that exist on a substantial portion of the United States currency. *See id.* at 315 (citing *United States v. Carr*, 25 F.3d 1194, 1215 (3d Cir. 1994) (Becker, J., concurring in part and dissenting in part)) The Eleventh Circuit recently noted that “as much as 80 [percent] of currency in circulation has drug residue.” *United States v. \$242,484.00*, 351 F.3d 499, 511 (11th Cir. 2003), *vacated on other grounds by reh’g en banc*, 357 F.3d 1225 (11th Cir. 2004). Therefore, even those who are innocent of any criminal activity face a substantial likelihood that a trained drug-sniffing dog will alert to the presence of contraband, in the form of drug residue on their currency, and thereby subject them to an invasive governmental search.

Even in the absence of tainted currency, innocent individuals face the threat of other false positives from detection dogs. Allowing probable cause to be established based upon the use of an unreliable investigative technique, such as a narcotics-detection dog or other allegedly ‘infallible’ search, “is . . . highly problematic because it is an exception that threatens to swallow the rule . . . that all government searches are presumptively unreasonable unless accompanied by a warrant or covered by a particular and limited exception.” Hunt, *supra* at 335. This exception could leave the public “at the mercy of advancing technology” as Justice Scalia warned in *Kyllo*. 533 U.S. at 36.

**B. In Order to Establish Probable Cause Based on the Use of an Investigative Technique, a Court Should Consider Whether the Technique Is Reliable**

The Court has made clear in the past that an assertion of probable cause may not rest upon “mere conclusory statement[s]” that lack “any basis at all for making a judgment regarding probable cause.” *Illinois v. Gates*, 462 U.S. 213, 239 (1983) (citing *Nathanson v. United States*, 290 U.S. 41 (1933)). Rather, the officers seeking to establish probable cause must establish a “fair probability that contraband or evidence of a crime will be found in a particular place” based on the “totality of the circumstances analysis.” *Gates*, 462 U.S. at 238. A reviewing magistrate must have “[s]ufficient information [to] allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.” *Id.* at 239. The reliability of the source of information is a “highly relevant” factor in determining whether the probable cause requirement has been satisfied. *Id.* at 230. See *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364, 371 (2009); *Arizona v. Evans*, 514 U.S. 1, 16 (1995) (O’Connor, J., concurring).

**III. New Investigative Techniques Should Be Used Based on Research, Testing, and Data Indicating Reliability**

The development of new investigative techniques is important for effective law enforcement, but these techniques should be constantly evaluated to determine their reliability. Forensic science has been widely criticized in recent years because of a lack of clear standards and credible research to

support technical conclusions. See National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* 2 (2009) [hereinafter National Academy Report]. There have been some efforts to improve these procedures, including the development of standard-setting groups by the Federal Bureau of Investigation ("FBI") and others. See, e.g., Fed. Bureau of Investigation, U.S. Dep't of Justice, *Scientific Working Group on Dogs and Orthogonal Detection Guidelines*, 8 Forensic Science Comm. (Oct. 2006).<sup>2</sup>

Still, the rapid deployment of new investigative techniques has outpaced the ability to develop appropriate standards to ensure reliability and effectiveness. A lack of clear standards for the use of detection dogs, for example, highlights the need for additional evidence to support a finding of probable cause. Without this evidence, courts risk encouraging unreliable and ineffective law enforcement techniques as well as weakening constitutional privacy protections, as searches will occur regardless of whether evidence is found.

New techniques that have recently been developed by federal agencies to detect contraband and seize illegal communications present similar problems to the detection dogs in this case. Examples include Terahertz Wave Reflection Spectroscopy, see *infra* Part III.B.1, Millimeter Wave and Backscatter

---

<sup>2</sup> Available at [http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/oct2006/standards/2006\\_10\\_standards01.htm](http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/oct2006/standards/2006_10_standards01.htm).

X-Ray (airport body scanners), *see infra* Part III.B.2, and message interception software (“Carnivore”). *See infra* Part III.B.3. A decision to reverse the Florida Supreme Court, as applied to these digital search techniques, could unleash a new generation of “electronic canine sniffs” that would operate largely beyond Fourth Amendment review.

**A. The National Academy of Sciences and Other Experts Have Raised Significant Concerns About the Lack of Reliable Standards for Investigative Techniques**

*Amicus* EPIC’s concerns about the outcome in this case arise in large part because of a growing scientific and legal consensus about the need to assess the reliability and impact of new investigative techniques. As Senator Patrick Leahy explained at the commencement of a series of recent hearings on forensic science before the Senate Judiciary Committee, “there is agreement that we must dedicate resources to basic foundational research into the validity of forensic disciplines and the methods they employ, and that we must agree on basic standards.” *Improving Forensic Science in the Criminal Justice System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary).

A 2008 Report by the National Academy of Sciences identified several of significant problems in forensic science, including “the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis” and the subsequent “admission of erroneous or misleading

evidence.” National Academy Report at 4. The National Academy Report, issued after the Court’s decision in *Illinois v. Caballes*, 543 U.S. 405 (2005), was commissioned by Congress to “identify the needs of the forensic science community.” See The Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006. P.L. No. 109-108, 119 Stat. 2290 (2005). The expert panel reviewed current forensic methods and made recommendations to help establish guidelines and best practices. National Academy Report at 2. The panel focused on the importance of minimizing the forensic community’s “current fragmentation and inconsistent practices,” including a lack of “uniformity in certification of forensic practitioners.” *Id.* at 6. This Court has previously recognized the significance of the National Academy Report in identifying problems with the reliability of forensic methods. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009).<sup>3</sup> The Court

---

<sup>3</sup> In full, the Court stated:

Nor is it evident that what respondent calls “neutral scientific testing” is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, “[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.” National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* 183 (2009) (hereinafter National Academy Report). And “[b]ecause forensic scientists often are driven in their



should look to that report again when considering the required reliability of the detection dog methods at issue in this case, and in other probable cause cases going forward.

The Florida Supreme Court below reached the conclusion that “the State must introduce evidence concerning the dog’s reliability” in a case where the State intends for the “dog’s alert [to provide] probable cause for a search . . . .” *Harris v. State*, 71 So.3d 756, 759 (Fla. 2011). The National Academy Report focused on the same problem where “the interpretation of forensic evidence is not always based on scientific studies to determine its validity.” National Academy Report at 8. This problem is compounded by the use of “subjective assessments” where there exists “the potential for bias and error in human observers.” *Id.*

This Court has recognized that, in the context of the Federal Rules of Evidence, a “trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). The focus of a trial judge should be solely on “principles and methodology . . . .” *Id.* at

---

work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” *Id.*, at 23–24. A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.

*Melendez-Diaz*, 557 U.S. at 318.



595. This presents a problem where “[f]orensic science facilities exhibit wide variability in capacity, oversight, staffing, certification, and accreditation across federal and state jurisdictions.” National Academy Report at 14. The National Academy Report made several recommendations for improving the current, fragmented system. Chief among them was the establishment and funding of “an independent federal entity, the National Institute of Forensic Sciences (‘NIFS’).” *Id.* at 19. The Report recommended that NIFS have an advisory board comprised of experts in “forensic science disciplines . . . information technology, measurements and standards, testing and evaluation, law, [and] national security . . . .” *Id.* The NIFS would be responsible for implementing standardized reporting, increasing research, developing best practices, and imposing quality control. *Id.* at 19-33.

The problem of the reliability of expert evidence in the courtroom is not new. See Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40 (1901). The problems with forensic science identified by the National Academy Report are also not new. See James W. Osterburg, *A Commentary on Issues of Importance in the Study of Investigation and Criminalistics*, 11 J. Forensic Sci. 261 (1966). After this Court’s creation of a new evidentiary test in *Daubert*, 509 U.S. 579 (1993), some forensic associations have even argued in favor of treating “forensic” testimony as non-scientific to avoid exacting standards. See Brief for the Int’l Assn. of Arson Investigators, *Mich. Millers Mutual Ins. Co. v. Benfield*, 140 F.3d 915 (11th Cir. 1998). However,

criminal forensic methods should be more reliable, not less, due to the risk of wrongful conviction and unwarranted search and seizure of private property.

The National Academy Report provided additional credence to the arguments of many legal scholars and scientific experts who raised similar questions about forensic methods over the past thirty years.<sup>4</sup> At the time that the Court ruled in *Daubert*, the issue of reliability of scientific evidence admitted in civil trials (and certain criminal contexts) had reached a climax.<sup>5</sup> However, problems with the use of

---

<sup>4</sup> See, e.g., Peter W. Huber, *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books 1993). John J. Lentini, 'Progress' in *Fire Investigation: Moving from Witchcraft and Folklore to the Misuse of Models and the Abuse of Science*, 4th Int'l Symp. on Fire Investigation Sci. & Tech. (2010); Brandon L. Garret & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (2009); Jennifer L. Mnookin, *The Courts, the NAS, and the Future of Forensic Science*, 75 Brook. L. Rev., no. 4, at 1 (2009); Joseph L. Peterson & Anna S. Leggett, *The Evolution of Forensic Science: Progress Among the Pitfalls*, 36 Stetson L. Rev. 621 (2007); Paul C. Giannelli, *Forensic Science*, 33 J. L., Medicine, & Ethics 535 (2005); D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 Cal. L. Rev. 1 (2002); Paul C. Giannelli, 'Junk Science': *The Criminal Cases*, 84 J. Crim. L. & Criminology 105 (1993); Andre A. Moenssens, *Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. Crim. L. & Criminology 1 (1993); William C. Thompson, *Evaluating the Admissibility of New Forensic Tests: Lessons from the 'DNA War'*, 84 J. Crim. L. & Criminology 22 (1993).

<sup>5</sup> See examples from the 1993 *Expert Admissibility Symposium* of Northwestern's Journal of Criminal Law and Criminology:

such evidence in criminal trials “remained in the shadows.” Paul C. Giannelli, *‘Junk Science’: The Criminal Cases*, 84 J. Crim. L. & Crimonology 105, 128 (1993). Professor Giannelli warned at the time that “[t]he present adversary system, however, does not contain sufficient safeguards to protect against the misuse of scientific evidence.” *Id.*<sup>6</sup>

Recently a group of law professors, academic researchers, and practicing forensic scientists, led by professor Jennifer Mnookin, sought to develop a common framework for modern forensics. See Jennifer L. Mnookin et al., *The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. Rev. 725 (2011). Professor Mnookin’s study argues for an increased focus on empiricism, transparency, and the type of ongoing critical perspective inherent in a “research culture.” *Id.* at 740-44. These values could be promoted in unified standards set for various forensic techniques, which could then be used by courts to establish reliability.

The National Academy Report stressed that “[s]tandards provide the foundation against which

---

Giannelli, Moenssens, and Thompson as well as Peter Huber’s book *Galileo’s Revenge*, *supra* note 2.

<sup>6</sup> Professor Giannelli is one of several experts who recently testified before the Senate Judiciary Committee on the need for a new scientific approach to forensics, as outlined in the National Academy Report. See *Strengthening Forensic Science in the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (testimony of Professor Paul Giannelli, Case Western Reserve University).

performance, reliability, and validity can be assessed.” National Academy Report at 201. They also “make it possible to replicate and empirically test procedures and help disentangle method errors from practitioner errors.” *Id.* As the Report notes, the FBI initiated a series of Scientific Working Groups (“SWGs”) in the early 1990s to “facilitate consensus around forensic science operations among federal, state, and local agencies.” *Id.* at 202 (citing Fed. Bureau of Investigation, *Scientific Working Groups*, Forensic Science Comm. (Jul. 2000)). One of these working groups, SWGDOG, was established in January 2005 “in an effort to develop consensus-based guidelines” for the use of detection-dogs. Fed. Bureau of Investigation, *Scientific Working Group on Dogs and Orthogonal Detection Guidelines (SWGDOG)*, Forensic Science Comm. (Oct. 2006). The Report notes that, “[i]deally, standards [from these groups] should be consistently applicable and measureable.” National Academy Report at 203.

The SWGDOG has established “consensus-based best practice general guidelines for training, certification, and documentation pertaining to all canine disciplines.” Scientific Working Group on Dog and Orthogonal Detector Guidelines, *SWGDOG SC2 – General Guidelines* (1st Rev. 2009).<sup>7</sup> The SWGDOG guidelines outline the best practices for dog training and certification, which include analysis of field tests and performance history, similar to what was required by the Florida Supreme Court. *Id.* at 2-4. *C.f. Harris*, 71 So.3d at 769. Even if the Court does

---

<sup>7</sup> Available at <http://www.swgdog.org/>.

not apply the *Daubert* test strictly in the context of a probable cause determination, a clear standard like the one established by SWGDOG, which was not followed by the officers in the case now before the Court, should weigh heavily in the “totality of the circumstances” under *Gates*. 462 U.S. at 238.

These standards would provide protection for individuals from unreasonable intrusions, and would also encourage the use of reliable investigative techniques. Establishing a requisite level of reliability of narcotic dog detection techniques “serves to deter deliberate, reckless, or grossly negligent conduct, or . . . recurring or systemic negligence” in establishing probable cause. *Herring v. United States*, 555 U.S. 135, 144 (2009).

### **B. New Forensic Techniques Demonstrate the Ongoing Problem of Inadequate Testing and Evaluation**

As with detection dogs, new forensic technique requires extensive training, research, and validation. These tools may help solve crimes, but a substantial amount of work must take place before they are used in the field. When an agent uses an investigative technique to uncover predicate facts used to justify a search, that agent should be able to demonstrate that the technique is tested, reliable, and has been properly used and maintained. Without such proof there can be no probable cause.

As the examples below show, the development of new investigative techniques is an ongoing process. Results obtained in the lab are not necessarily replicated in the field. And the prospect that courts would rely on imperfect drug detection dogs to allow



findings of probable cause for more advanced techniques is troubling. "The dog sniff . . . is just one crude, old-fashioned example of the search technologies available to law enforcement." Julian Sanchez, *The Pinpoint Search*, Reason (Jan. 2007).<sup>8</sup> A "new wave of advanced surveillance tools," far more sophisticated than canine sniffs, will be used to detect "weapons, explosives, and illicit computer files." *Id.*

Law enforcement is now deploying investigative techniques involving chemical detectors, computer hash values, and airport body scanners to attempt to detect contraband. See Timothy C. MacDonnell, *Orwellian Ramifications: The Contraband Exception to the Fourth Amendment*, 41 U. Mem. L. Rev. 299, 345-347 (2010). According to the author, this technology is likely to be used to justify warrantless searches, pursuant to the Court's earlier decisions in *Place* and *Cabelles*. *Id.* at 348.

Many new devices are created to aid law enforcement, but they are not all sufficiently reliable and effective to support invasive searches and the exposure of private information. For example, terahertz scanning technology, whole body imaging, and digital interception all present reliability problems similar to those at issue in this case.

---

<sup>8</sup> Available at <http://reason.com/archives/2007/01/10/the-pinpoint-search>.



**1. Terahertz Scanners Generate False Positives Based on Trace Amounts and Interference Can Cause Unreliable Results**

Law enforcement agencies continually develop new technologies in an attempt to detect contraband substances. One example is Terahertz ("THz") Wave Reflection Spectroscopy. See Xi-Cheng Zhang & Jingzhou Xu, *Introduction to THz Wave Photonics* (Springer 2010). This technology has been the subject of extensive research and debate, in part, because it is intended to identify substances from a distance based on a recognized molecular "fingerprint." See Markus Walther et al., *Chemical Sensing and Imaging with Pulsed Terahertz Radiation*, 397 *Analytical & Bioanalytical Chemistry* 1009 (2010). Still, despite ambitious views about the applications of this technology in industrial,<sup>9</sup> security,<sup>10</sup> and even

---

<sup>9</sup> See, e.g., Ronald Ulbricht et al., *Carrier Dynamics in Semiconductors Studied with Time-Resolved Terahertz Spectroscopy*, 83 *Rev. Mod. Phys.* 543 (2011); Ikufumi Katayama & Masaaki Ashida, *Broadband Terahertz Spectroscopy and Its Application to the Characterization of Thin Films*, 53 *J. Vacuum Soc'y* 301 (2010).

<sup>10</sup> See, e.g., *BomDetec – Phase I Preliminary Design Review Report*, submitted by Gordon-CenSSiS, Nat'l Sci. Found. Research Ctr., to the Homeland Sec. Advanced Research Projects Agency of the Dep't of Homeland Sec. in response to Prototypes and Technology for Improvised Explosives Device Detection (PTIEDD) Broad Agency Announcement 05-05 (BAA 05-03) [hereinafter *CenSSiS Design Report*]. For more information about this process see <http://epic.org/foia/dhs/terahertz-frisking.html>.

law enforcement settings,<sup>11</sup> “for many realistic applications in chemical analysis and imaging of biological systems, the technology still lacks the required sensitivity and also suffers from its intrinsically poor spatial resolution.” *Id.* at 1010.

The THz scanning technology has shown promise in laboratory conditions, but would face significant challenges if used to identify substances remotely in real world circumstances. Terahertz scanners manipulate electro-magnetic waves between the range of microwaves and infrared waves. *Id.* By analyzing the reflection created by two lasers aimed at a target under controlled conditions, detectors can create material signatures in the terahertz range through spectroscopy. See Roger N. Clark, U.S. Geological Survey, *Chapter 1: Spectroscopy of Rocks and Minerals, and Principles of Spectroscopy* (1999). These spectroscopic signatures can create a unique “fingerprint,” which a THz scanner may be able to match with the signature of an existing chemical compound. Mark Marchand, *A Revolutionary*

---

<sup>11</sup> Al Baker, *Police Working on Technology to Detect Concealed Guns*, N.Y. Times (Jan. 17, 2012), <http://cityroom.blogs.nytimes.com/2012/01/17/police-working-on-technology-to-detect-concealed-guns/>; Jess McNally, *Terahertz Detectors Could See Through Your Clothes From a Mile Away*, Wired (July 12, 2010), <http://www.wired.com/wiredscience/2010/07/terahertz-detection/>; Keith Wagstaff, *Police Developing Tech to Virtually Frisk People from 82 Feet Away*, Time (Jan. 20, 2012), <http://techland.time.com/2012/01/20/police-developing-tech-to-virtually-frisk-people-from-82-feet-away/>.

*Breakthrough in Terahertz Remote Sensing*, Rensselaer Polytechnic Institute (July 12, 2010).<sup>12</sup>

In laboratory conditions, a THz scanner may be able to detect signals from up to 67 feet away. See Jingle Liu et al., *Broadband Terahertz Wave Remote Sensing Using Coherent Manipulation of Fluorescence from Asymmetrically Ionized Gases*, 4 *Nature Photonics* 627 (2010). However, this technique is vulnerable to interference from the presence of moisture and metal, see CenSSiS Design Report 54, *supra* at Note 10, which would affect the reliability of scans conducted in real world settings. This problem is exacerbated when the device is used outdoors, due to increased water vapor. *Id.* at 64-65. In addition, the THz scanning technique relies on a “comparison between the measured spectrum and a library spectrum,” which requires the creation of a verifiable library of material signatures. *Id.* at 56. When this comparison occurs, the operator must determine an acceptable “confidence level” used to determine when a “match” has occurred. *Id.* at 63-64.

Even beyond the underlying technical difficulties with creating and using terahertz signatures to reliably identify target substances, the use of THz scanners would present many of the same problems as detection dogs. The device would ultimately be operated by an agent, and would be subject to human error and manipulation in its configuration, operation, and interpretation. See

---

<sup>12</sup><http://news.rpi.edu/update.do?artcenterkey=2748&setappvar=page%281%29>.

*Melendez-Diaz*, 557 U.S. at 318. The device would also be capable of detecting trace particles of a target substance, *see generally* S. Kong & D. Wu, *Terahertz Time-Domain Spectroscopy for Explosive Trace Detection*, CIHSPS – IEEE Int’l Conf. on Computational Intelligence for Homeland Sec. & Personal Safety (2006), and thus an alert would not necessarily indicate that a substantial amount of the target substance was present. Furthermore, the reliability of the spectroscopy technique depends on the reliability of the match between the current reading and the material signature created beforehand. *See* Kodo Kawase et al., *Non-destructive Terahertz Imaging of Illicit Drugs Using Spectral Fingerprints*, 11:20 Optics Express 2550 (2003). Any of these limitations could cause significant error, which could lead to an unreasonable search of an individual and exposure of private information. In order to support a finding of probable cause for a warrantless search, such a technique would have to be shown to produce reliable and verifiable results.

**2. Airport “Body Scanners” Are Not Designed to Identify the Contraband the Agency Claims They Detect**

In 2005, the TSA began deploying Whole Body Imaging (“WBI”) devices in U.S. airports. *See* U.S. Dep’t of Homeland Sec., *Budget-in-Brief Fiscal Year 2006* at 81-82 (Feb. 7, 2005).<sup>13</sup> As with narcotics detection dogs, agents attempt to use WBI technology

---

<sup>13</sup> Available at [http://www.dhs.gov/xlibrary/assets/Budget\\_BIB-FY2006.pdf](http://www.dhs.gov/xlibrary/assets/Budget_BIB-FY2006.pdf).

to establish probable cause to search air travelers and their effects. But in 2007, the Committee on Assessment of Security Technologies for Transportation of the National Academy of Sciences found there had been a “significant overselling of the potential of [WBI technology] to address screening requirements” and that lack of “understanding of the technology and its . . . limitations appear to exaggerate the potential benefits of the technology.” *Id.* at 3. The Committee said that WBI technologies were not reliable in detecting explosive materials. Comm’n on Assessment of Sec. Tech. for Transp., National Academy of Sciences, *Assessment of Millimeter-Wave and Terahertz Technology for Detection and Identification of Concealed Explosives and Weapons* 4 (2007). The expert panel found that WBI technology can locate certain anomalies or other objects on the body, but cannot necessarily identify the objects. *Id.* at 43. Appropriately identifying the object “may be necessary in order to reduce false positives generated by prosthetics, shoe shanks, and so on.” *Id.* Any alert—including false positives—by WBI technology can subject individuals to an invasive search, including an aggressive “frisking” of the traveler’s body, by TSA personnel. The study concluded, “there is insufficient technology available to develop a system capable of identifying concealed explosives.” *Id.* at 59.

Additional evidence bolsters the study’s findings. The TSA’s own Procurement Specifications indicate that the WBI machines were not designed to detect powdered explosives, a primary justification for the program. See Transp. Sec. Admin., U.S. Dep’t of Homeland Sec., *Procurement Specification for*



*Whole Body Imager Devices for Checkpoint Operations*, Sept. 23, 2008.<sup>14</sup> Subsequent studies by the Government Accountability Office and independent experts confirm the failure to adequately evaluate the technique prior to deployment. See *U.S. Gov't Accountability Office*, GAO-12-541T, *Transportation Security Administration: Progress and Challenges Faced in Strengthening Three Key Security Programs* (2012); Leon Kauffman & Joseph W. Carlson, *An Evaluation of Airport X-ray Backscatter Units Based on Image Characteristics*, 4 J. Transp. Sec. 73 (2011).

Members of Congress have also expressed concern about the reliability of this new search technology. In May 2012, Members of the House Transportation and Infrastructure Committee and the Oversight and Government Reform Committee sharply criticized the agency for spending hundreds of millions of dollars on technology that they said had not been properly tested. *TSA Oversight Part IV: Is TSA Effectively Procuring, Deploying, and Storing Aviation Security Equipment and Technology? Joint Hearing Before the H. Comm. on Oversight and Government Reform and the Comm. on Transportation and Infrastructure*, 112th Cong. (2012). A report released by the two committees that day called the machines "ineffective." Staff of H. Comm. on Oversight and Gov't Reform & H. Comm. on Transp. and Infrastructure, 112th Congress, *Airport Insecurity: The TSA's Failure to Effectively*

---

<sup>14</sup> Available at

[http://epic.org/open\\_gov/foia/TSA\\_Procurement\\_Specs.pdf](http://epic.org/open_gov/foia/TSA_Procurement_Specs.pdf).



*Procure, Deploy and Warehouse Its Screening Technologies*, (Comm. Print 2012).

The approach adopted by the Florida Supreme Court below would avoid this unfortunate outcome by encouraging greater scrutiny of invasive and unreliable threat-identification techniques. By requiring that the Government present some evidence of reliability, this Court would ensure that searches are not devoid of the procedural protections guaranteed by the Fourth Amendment.

### **3. Digital Intercept Devices Overcollect Communications Data**

In the late 1990s, the FBI developed a software program called “Carnivore” to enable interception of Internet communications pursuant to a court order. *See Internet and Data Interception Capabilities Developed by FBI: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000) (statement of Donald M. Kerr, Assistant Director, Laboratory Division, Federal Bureau of Investigation). Carnivore was designed to act like a commercial packet “sniffer” product, which analyzes electronic communications packets as they travel through a network. *See id.* According to the agency, Carnivore could be configured to filter and then store “transmissions which comply with pen register court orders, trap & trace court orders, Title III interception orders, etc.” *Id.*

The IIT Research Institute conducted an independent assessment of the FBI’s program, and determined that the Carnivore software was capable of collecting “everything that passes by on the Ethernet segment to which it is connected.” IIT

Research Inst., *Independent Technical Review of the Carnivore System: Final Report* 4-3 (2000) [hereinafter IITRI Final Report]. The Report also found that “Carnivore version 1.3.4 collects more than would be permitted by the strictest possible construction of the pen-trap statute,” and the FBI “admitted that a previous version of Carnivore handled pipelined SMTP [packets] incorrectly.” *Id.* However, the Report concluded that there were “significant procedural checks to minimize configuration errors.” *Id.*

The proper configuration and use of the Carnivore software was thus a critical element of any legal use of the tool. *See Melendez-Diaz*, 557 U.S. at 318. As Professor Orin Kerr also noted, “legitimate concerns exist that the program may malfunction, and as with any tool, human error can cause the program to be configured incorrectly.” Orin Kerr, *Internet Surveillance Law After the USA PATRIOT Act: The Big Brother That Isn’t*, 97 Nw. U. L. Rev. 607, 654 (2003). In response to this concern, Congress added new reporting requirements under the pen register statute, codified at 18 U.S.C. § 3123(a)(3), that require documentation of:

- (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network;
- (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information;

- (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and
- (iv) any information which has been collected by the device

18 U.S.C. § 3123(a)(3).

Such documentation, as the Florida Supreme Court below recognized regarding the use of drug detection dogs, is necessary to establish the reliability of the investigative techniques. Without detailed information about the configuration or capabilities of a particular investigative tool, a court cannot determine whether a search complies with constitutional and statutory requirements; a judge cannot accept conclusory and general statements about the accuracy and reliability of the methods used.

## CONCLUSION

Recognizing the risk that “electronic canine sniffs” have significant implications for the future of the Fourth Amendment, EPIC respectfully asks this Court to uphold the decision of the Florida Supreme Court.

Respectfully submitted,

MARC ROTENBERG  
ALAN BUTLER  
KHALLAH BARNES  
ELECTRONIC PRIVACY  
INFORMATION  
CENTER (EPIC)  
1718 Connecticut Ave. NW  
Suite 200  
Washington, DC 20009  
(202) 483-1140  
(202) 483-1248 (fax)  
rotenberg@epic.org

August 31, 2012

**AMICUS  
CURIAE  
BRIEF**

**In The  
Supreme Court of the United States**

STATE OF FLORIDA,

*Petitioner,*

v.

CLAYTON HARRIS,

*Respondent.*

**On Writ Of Certiorari To  
The Supreme Court Of Florida**

**BRIEF OF AMICI CURIAE  
FOURTH AMENDMENT SCHOLARS  
IN SUPPORT OF RESPONDENT**

LESLIE A. SHOEBOOTHAM  
Associate Professor of Law  
*Counsel of Record*  
LOYOLA UNIVERSITY NEW ORLEANS  
COLLEGE OF LAW  
7214 St. Charles Ave.  
New Orleans, LA 70118  
(504) 861-5683  
shoeboth@loyno.edu



## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                                                                                                                                                                             | Page |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| INTEREST OF <i>AMICI CURIAE</i> .....                                                                                                                                                                                                                                                                                                                                                                       | 1    |
| SUMMARY OF ARGUMENT .....                                                                                                                                                                                                                                                                                                                                                                                   | 2    |
| ARGUMENT .....                                                                                                                                                                                                                                                                                                                                                                                              | 5    |
| I. The State's "Credentials Alone" Canine-Reliability Test Violates the Fourth Amendment Because It Is Contrary To the Totality-of-the-Circumstances Analysis Required To Establish Probable Cause .....                                                                                                                                                                                                    | 8    |
| A. Probable Cause Must Be Determined Under the Totality of the Circumstances Through a Case-By-Case Determination of the Facts and Circumstances That Establish Probable Cause.....                                                                                                                                                                                                                         | 10   |
| B. The State's "Credentials Alone" Canine-Reliability Test Violates the Fourth Amendment Because It Isolates Individual Factors For Trial Court Consideration – Training or Certification – and Limits Trial Courts From Considering Other Probative Factors – i.e., Field-Performance Records – Which Is Contrary To the Totality-of-the-Circumstances Analysis Required To Establish Probable Cause ..... | 14   |
| C. Under the Circumstances, the Florida Supreme Court's Request For Additional Probative Canine-Reliability Information For Consideration In a Totality Analysis of Probable Cause Was Reasonable.....                                                                                                                                                                                                      | 21   |

## TABLE OF CONTENTS – Continued

|                                                                                                                                                                                                                                                                  | Page |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 1. Differences in Canine Drug-Detection Training and Certification Support the Reasonableness of the Florida Supreme Court's Case-By-Case Reliability Determination.....                                                                                         | 22   |
| 2. Drug-Detection Dogs Are Trained To Alert To Volatile Molecules and Compounds That Are Not Unique To Contraband .....                                                                                                                                          | 25   |
| 3. Canine Alerts To So-Called Residual Odors Support the Reasonableness of the Florida Supreme Court's Case-By-Case Reliability Determination.....                                                                                                               | 28   |
| 4. Concerns of Handler Error and Handler Cuing Support the Reasonableness of the Florida Supreme Court's Case-By-Case Reliability Determination .....                                                                                                            | 30   |
| 5. The Florida Supreme Court's Request For Additional Canine-Reliability Information Was Reasonable.....                                                                                                                                                         | 33   |
| II. The Florida Supreme Court's Request For Additional Probative Canine-Reliability Evidence Was Necessary To Ensure That the Warrant Exception For Canine Sniffs of Luggage and Vehicles Is Adequately Supported By the Technique's Accuracy Justification..... | 34   |

## TABLE OF CONTENTS – Continued

|                                                                                                                                                                   | Page |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| A. The Warrant Exception For a Canine Sniff of Luggage and Vehicles Assumed the Accuracy of This Investigative Technique.....                                     | 35   |
| B. The Florida Supreme Court Carried Out Its Constitutional Obligation – Ensuring That the Canine-Sniff Technique’s Accuracy Justification Is Not Undermined..... | 38   |
| CONCLUSION.....                                                                                                                                                   | 40   |
| APPENDIX 1 – List of <i>Amici Curiae</i> .....                                                                                                                    | 1a   |

## TABLE OF AUTHORITIES

|                                                                                        | Page           |
|----------------------------------------------------------------------------------------|----------------|
| CASES:                                                                                 |                |
| <i>Aguilar v. Texas</i> , 378 U.S. 108 (1964).....                                     | 34             |
| <i>Arizona v. Gant</i> , 556 U.S. 332 (2009).....                                      | 4, 34, 35, 36  |
| <i>California v. Carney</i> , 471 U.S. 386 (1985).....                                 | 9              |
| <i>Carroll v. United States</i> , 267 U.S. 132 (1925) .....                            | 8              |
| <i>Florida v. J.L.</i> , 529 U.S. 266 (2000).....                                      | 13             |
| <i>Florida v. Jardines</i> , 73 So.3d 34 (Fla. 2011).....                              | 38, 39         |
| <i>Harris v. State</i> , 71 So.3d 756 (Fla. 2011).....                                 | <i>passim</i>  |
| <i>Horton v. Goose Creek Indep. Sch. Dist.</i> , 690<br>F.2d 470 (5th Cir. 1982) ..... | 28             |
| <i>Illinois v. Caballes</i> , 543 U.S. 405 (2005).....                                 | <i>passim</i>  |
| <i>Illinois v. Gates</i> , 462 U.S. 213 (1983).....                                    | <i>passim</i>  |
| <i>Katz v. United States</i> , 389 U.S. 347 (1967).....                                | 8              |
| <i>Maryland v. Pringle</i> , 540 U.S. 366 (2003) .....                                 | 10             |
| <i>Matheson v. State</i> , 870 So.2d 8 (Fla. Ct. App. 2<br>Dist. 2003) .....           | 3, 22, 23      |
| <i>New York v. Belton</i> , 453 U.S. 454 (1981).....                                   | 35             |
| <i>Ornelas v. United States</i> , 517 U.S. 690 (1996) .....                            | 33             |
| <i>Richards v. Wisconsin</i> , 520 U.S. 385<br>(1997).....                             | 12, 13, 17, 18 |
| <i>State v. Cabral</i> , 859 A.2d 285 (Md. Ct. Spec.<br>App. 2004) .....               | 28, 30         |
| <i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....                                          | <i>passim</i>  |
| <i>United States v. Arvizu</i> , 534 U.S. 266 (2002) ....                              | <i>passim</i>  |

## TABLE OF AUTHORITIES – Continued

|                                                                                             | Page          |
|---------------------------------------------------------------------------------------------|---------------|
| <i>United States v. Cortez</i> , 449 U.S. 411 (1981) .....                                  | 11            |
| <i>United States v. Funds in the Amount of \$30,607, 403 F.3d 448 (7th Cir. 2005)</i> ..... | 28, 30        |
| <i>United States v. Jacobsen</i> , 466 U.S. 109 (1984).....                                 | 4, 36, 37, 38 |
| <i>United States v. Ludwig</i> , 641 F.3d 1242 (10th Cir. 2011) .....                       | 25            |
| <i>United States v. Place</i> , 462 U.S. 696 (1983).....                                    | <i>passim</i> |
| <i>Wong Sun v. United States</i> , 371 U.S. 471 (1963).....                                 | 33            |

## CONSTITUTIONAL PROVISIONS:

|                             |               |
|-----------------------------|---------------|
| U.S. Const. amend. IV ..... | <i>passim</i> |
|-----------------------------|---------------|

## OTHER SOURCES:

|                                                                                                                                                                                                                                                                             |            |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
| Brief of <i>Amici Curiae</i> Fourth Amendment Scholars in Support of Respondent, <i>Florida v. Jardines</i> , <i>cert. granted</i> , 132 S.Ct. 995 (No. 91-564) (Jan. 6, 2012), 2012 WL 2641847 .....                                                                       | 25, 26, 28 |
| Kenneth G. Furton, et al., <i>Identification of Odor Signature Chemicals in Cocaine Using Solid Phase Microextraction-Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency</i> , 40 J. Chromatographic Sci. 147 (2002) .....    | 26, 27, 29 |
| Lisa Lit, <i>Handler beliefs affect scent detection dog outcomes</i> , 14 Animal Cognition 387 (2011), available at <a href="http://www.springerlink.com/content/j477277481125291/fulltext.pdf">http://www.springerlink.com/content/j477277481125291/fulltext.pdf</a> ..... | 31, 32, 33 |

## TABLE OF AUTHORITIES – Continued

|                                                                                                                                                                                                                                                                                                                                                    | Page           |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| Richard E. Myers II, <i>Detector Dogs and Probable Cause</i> , 14 Geo. Mason L. Rev. 1 (2006).....                                                                                                                                                                                                                                                 | 31             |
| National Narcotic Detector Dog Assoc., <i>Narcotic Detection Standards</i> 1, 2 (2008), available at <a href="http://www.nndda.org/official-docs/doc_view/2-narcotics-detection-standard?tmpl=component&amp;format=raw">http://www.nndda.org/official-docs/doc_view/2-narcotics-detection-standard?tmpl=component&amp;format=raw</a> .....         | 23, 24         |
| National Police Canine Assoc., <i>Standards for Training &amp; Certifications Manual</i> (2011), available at <a href="http://www.npca.net/Files/Standards/Standards.pdf">http://www.npca.net/Files/Standards/Standards.pdf</a> .....                                                                                                              | 22, 23, 24, 39 |
| North American Police Working Dog Assoc., <i>Bylaws and Certification Rules</i> (2011), available at <a href="http://www.napwda.com/uploads/bylaws-cert-rules.pdf">http://www.napwda.com/uploads/bylaws-cert-rules.pdf</a> .....                                                                                                                   | 22, 23, 24     |
| SWGDOG Membership Commentary on ‘Handler beliefs affect scent detection dog outcomes’ by L. Lit, J.B. Schweitzer and A.M. Oberbauer (2011), available at <a href="http://casgroup.fiu.edu/news/docs/2126/1302011268_SWGDOG_Response_to_Lit_Study.pdf">http://casgroup.fiu.edu/news/docs/2126/1302011268_SWGDOG_Response_to_Lit_Study.pdf</a> ..... | 32, 33         |
| United States Police Canine Assoc., Inc., <i>Certification Rules and Regulations</i> (2012), available at <a href="http://www.uspcak9.com/certification/USPCA_Rulebook2012.pdf">http://www.uspcak9.com/certification/USPCA_Rulebook2012.pdf</a> .....                                                                                              | 22, 24, 39     |
| U.S. Dep’t of the Army, Field Manual No. 3-19.17, <i>Military Working Dogs</i> (2005).....                                                                                                                                                                                                                                                         | 24             |
| Webster’s New Dictionary (2001).....                                                                                                                                                                                                                                                                                                               | 25             |



## INTRODUCTION

The *amici curiae* submit this brief in support of Respondent, and urge the Court to affirm the decision of the Florida Supreme Court.

---

## INTEREST OF AMICI CURIAE<sup>1</sup>

*Amici curiae* are professors and scholars in Fourth Amendment studies. *Amici* submit this brief in support of Respondent's position that under the totality of the circumstances, an alert by a drug-detection dog of unproven reliability fails to establish probable cause to justify a search. This brief addresses the State of Florida's conflation of the quantum of proof required to show probable cause – the fair-probability burden of proof – with the traditional legal analysis for determining probable cause – the totality-of-the-circumstances assessment. Further, this brief addresses the State's argument that trial courts should be prohibited from considering other probative evidence of a canine's reliability, aside from the detection dog's training or certification.

---

---

<sup>1</sup> The parties have consented to the filing of this brief in letters submitted to the Court.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF ARGUMENT

The Court is asked to consider what evidence courts may use in determining whether a drug-detection dog's alert to the exterior of a vehicle is sufficiently reliable to establish probable cause to search the vehicle. The disagreement in this case turns on whether trial courts must accept the reliability of drug-detections dogs for purposes of probable cause if the dog is "trained" or "certified" in contraband detection (which this brief describes as a "credentials alone" canine-reliability test), or instead, if courts may require additional, probative information regarding canine reliability, such as the detection dog's field-performance records, for consideration in a totality-of-the-circumstances determination of probable cause. This brief argues against the "credentials alone" reliability test, and argues that the Florida Supreme Court's request for additional, probative canine-reliability evidence was reasonable based, in part, on (1) local considerations (including lack of standardized training or certification requirements for Florida's drug-detection dogs), and (2) concerns about circumstances that may reduce a particular dog's reliability for contraband detection in the field (including problems of canine-handler "cuing" and questions about whether "residual odors" of contraband may produce false-positive canine alerts).

In arguing that the "credentials alone" canine-reliability test is the applicable standard, the State of Florida's arguments conflate the quantum of proof required to demonstrate probable cause – the

fair-probability burden of proof – with the governing legal analysis – the totality of the circumstances. A “fair probability” thus became both the State’s goal *and* the State’s methodology for getting there. In so arguing, the State’s reconfiguration necessarily ignored the required legal analysis for determining probable cause – the totality-of-the-circumstances analysis – the approach that courts have “traditionally” used in determining whether a fair probability of criminal activity exists. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983). By making the end also the means, the State was thereby positioned to argue for a blanket limitation on canine-reliability evidence – a rule that disables courts from considering other probative evidence, such as a drug-detection dog’s field performance – an outcome that is entirely inconsistent with the traditional totality-of-the-circumstances determination of probable cause.

The Florida Supreme Court recognized the problems associated with the State’s “credentials alone” canine-reliability test, and the court’s concerns are supported by objective data. For instance, private vendors that certify and train drug-detection dogs have widely divergent standards that expose real differences in what canine professionals consider a properly certified canine-detection team. *See, e.g., Matheson v. State*, 870 So.2d 8, 14 (Fla. Ct. App. 2 Dist. 2003). Further, because drug-detection dogs are said to alert to “residual odors” of contraband, the detection dog’s field-performance records are important in determining canine reliability. Moreover, concerns

about handler error as well as handler cuing – which can affect the outcome of any given canine sniff – require review of the canine-handler's experience and field deployment. In sum, the Florida Supreme Court's request for an explanation of the canine-team's training, certification, and field performance, was a reasonable request for essential information for use in a totality-of-the-circumstances determination of probable cause.

Finally, the Florida Supreme Court's request for probative canine-reliability evidence, such as field-performance records, was necessary in order to ensure that the warrant exception for canine sniffs of luggage and vehicles remains adequately supported by this exception's justifications. The Court found a warrant exception based on the limited intrusiveness and accuracy of the canine-sniff technique for contraband detection involving luggage and vehicles. See *United States v. Place*, 462 U.S. 696, 707 (1983); *Illinois v. Caballes*, 543 U.S. 405, 409 (2005). Further, *Place*'s accuracy justification formed the basis of the Court's holding in *United States v. Jacobsen*, 466 U.S. 109, 124 (1984), which permitted field testing of suspected-cocaine because the testing, like a canine drug-detection sniff of luggage, could reveal only whether the white powder was cocaine.

The State cannot compel a canine-reliability test that so limits the trial court's consideration of the evidence that it "untether[s]" this warrant exception from the justifications that led the Court to create it in the first place. Cf. *Arizona v. Gant*, 556 U.S. 332,

343 (2009). In requiring additional, probative canine-reliability evidence, the Florida Supreme Court carried out its constitutional obligation, by ensuring that the accuracy justification on which this warrant exception is premised is not undermined.

For these reasons the Court should affirm the decision of the Florida Supreme Court, and hold that a drug-detection dog's reliability for contraband detection must be determined on a case-by-case basis applying a totality-of-the-circumstances analysis.

---

## ARGUMENT

The issue before the Court is what evidence courts may consider in determining whether a drug-detection dog's alert to the exterior of a vehicle is sufficiently reliable to establish probable cause to search the vehicle. The disagreement in this case turns on whether courts are permitted to determine canine reliability for contraband detection on a case-by-case basis, or instead, whether a drug-detection dog's reliability must be "deemed conclusive" if the detection dog is either "trained" or "certified" to detect contraband (which this brief describes as a "credentials alone" canine-reliability test).<sup>2</sup> See Pet'r Br., at 32; *see also id.* at 22, 24, 32, 37 n.8.

---

<sup>2</sup> The State argued additionally that a drug-detection dog is reliable, even without formal training or certification, if the dog "otherwise exhibit[s] reliable performance in detecting contraband". Pet'r Br., at 22; *see also id.* at 24.



The Florida Supreme Court concluded that a drug-detection dog's reliability for contraband detection must be determined on a case-by-case basis, and rejected the State of Florida's proposed limitation on canine-reliability evidence because (1) Florida lacks uniform certification standards for drug-detection dogs; (2) Florida lacks standardized drug-detection dog training criteria; and (3) Florida does not require any certification whatsoever of so-called "single-purpose"<sup>3</sup> drug-detection dogs, such as the dog at issue here. *See Harris*, 71 So.3d at 771. Further, based on the lack of uniformity and standardization of canine drug-detection qualifications as well as other considerations,<sup>4</sup> the Florida Supreme Court concluded that a detection dog's field-performance records were necessary in order to establish "a complete evaluation" of the individual dog's reliability for contraband detection. *See id.* at 769.

The State, on the other hand, contends that a "credentials alone" canine-reliability test is the applicable standard because detection-dog qualifications, by themselves, the State argues are enough to satisfy the State's fair-probability burden of proof required

---

<sup>3</sup> A "single-purpose dog" has received training "only to detect drugs," while a "dual-purpose dog" has received additional training, such as in "apprehension". *Harris*, 71 So.3d at 760.

<sup>4</sup> The Florida Supreme Court identified other important variables that may affect canine reliability for contraband detection, including canine alerts to residual odors of contraband, false alerts, handler error and handler cuing. *Harris*, 71 So.3d at 768-69.



for probable cause. See Pet'r Br., at 19-24. In getting to its desired outcome, the State made two analytical errors. First, the State reoriented the canine-reliability determination by using the quantum of proof required to show probable cause – the fair-probability burden of proof – as both its burden and as the governing legal analysis. A “fair probability” thus became both the State’s goal *and* the State’s methodology for getting there. In so arguing, the State’s reconfiguration necessarily ignored the required legal analysis for determining probable cause – the totality-of-the-circumstances analysis – the approach that courts have “traditionally” used in determining whether a fair probability of criminal activity exists. See *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (“[W]e reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations.”). By making the end also the means, the State was thereby positioned to argue for a blanket limitation on canine-reliability evidence – a rule that disables courts from considering other probative evidence, such as a drug-detection dog’s field performance – records that can assist in determining the dog’s reliability for contraband detection in the field.

Second, although the State applies a fair-probability burden in its own case, the State mistakenly requires “certainty” that other canine-reliability evidence – i.e., the detection dog’s field-performance records – would change the outcome of a “credentials alone” canine-reliability determination before such

evidence could be considered. *See, e.g.*, Pet'r Br., at 25-26. By categorizing and rejecting certain types of probative canine-reliability evidence, the State creates its own version of the "divide-and-conquer" approach to a totality analysis that the Court rejected in *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Isolating factors and limiting trial courts to consideration of only those factors (to the exclusion of other probative evidence) is incompatible with a totality analysis of probable cause.

**I. The State's "Credentials Alone" Canine-Reliability Test Violates the Fourth Amendment Because It Is Contrary To the Totality-of-the-Circumstances Analysis Required To Establish Probable Cause**

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures" and provides that "no Warrants shall issue, but upon probable cause. . . ." U.S. Const. amend. IV. A "search" for Fourth Amendment purposes occurs when the government intrudes on a person's "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Although the Fourth Amendment generally requires police to secure a warrant before conducting a search, the Court recognized an exception to the warrant requirement for a vehicle-search, if the vehicle is readily mobile and probable cause exists to believe that it contains contraband. *Carroll*

*v. United States*, 267 U.S. 132, 153 (1925); see also *California v. Carney*, 471 U.S. 386, 392 (1985) (finding, as an additional justification for the automobile exception, a reduced expectation of privacy in vehicles due to their “pervasive regulation”).

The Court also found an exception to the warrant requirement for a canine drug-detection sniff of luggage at an airport by a well-trained drug-detection dog. See *United States v. Place*, 462 U.S. 696, 707 (1983) (describing the canine sniff of luggage as “*sui generis*” because of the limited “manner” in which the information was revealed – the suitcase need not be opened – and the limited “content” of the information revealed – only the presence or absence of contraband). *Illinois v. Caballes* extended the warrantless use of the canine-sniff technique to a lawfully-stopped vehicle, because “the use of a well-trained narcotics-detection dog – one that does not expose noncontraband items that otherwise would remain hidden from public view – during a lawful traffic stop generally does not implicate legitimate privacy interests.” 543 U.S. 405, 409 (2005) (quoting *Place*, 462 U.S. at 707) (internal quotation marks and citation omitted).

Relying on *Caballes*’s description of the “well-trained” drug-detection dog – a dog that “does not expose noncontraband items”, the Florida Supreme Court equated a well-trained detection dog to a “reliable dog”, and proposed that “the best way” to determine whether a dog is “in fact well-trained, or reliable, is to evaluate the totality of the circumstances, including the dog’s training, certification, and performance.”

*Harris*, 71 So.3d at 766 n.6 (quoting *Caballes*, 543 U.S. at 409) (internal quotation marks omitted).

**A. Probable Cause Must Be Determined Under the Totality of the Circumstances Through a Case-By-Case Determination of the Facts and Circumstances That Establish Probable Cause**

While probable cause is a “fluid concept” that is “incapable of precise definition or quantification into percentages,” *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003) (quoting *Gates*, 462 U.S. at 232), the Court has been clear that probable cause must be determined under the totality of the circumstances. *Pringle*, 540 U.S. at 371 (observing that probable cause “depends on the totality of the circumstances”); see also *Gates*, 462 U.S. at 238. The Court has never limited the *types* of relevant information that a trial court may or should hear in considering the totality of the circumstances. In *Gates*, for example, it was the Illinois Supreme Court’s use of a rigid “superstructure” in determining probable cause that the Court rejected, 462 U.S. at 235, not a trial court’s authority to use the *very same information* “as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations”. *Id.* at 233; see also *id.* at 230 (“We agree with the Illinois Supreme Court that an informant’s ‘veracity,’ ‘reliability,’ and ‘basis of knowledge’ are all highly relevant . . . [, but] do not agree, however, that these elements should be understood as entirely separate and independent requirements. . . .”).

A totality-of-the-circumstances analysis requires trial courts to determine whether the facts and circumstances, “[t]aken together,” establish a fair probability of criminal activity. See *Arvizu*, 534 U.S. at 277 (describing a totality analysis in the context of a *Terry*-stop of a vehicle). In doing so, trial courts must avoid the mistake of considering the relevant facts and circumstances “in isolation from each other. . . .” *Id.* at 274 (rejecting a lower court’s “methodology”, *id.* at 268, of considering each fact separately to determine whether it was, by itself, suspicious, as a “divide-and-conquer” analysis which was inconsistent with the required totality assessment). It is this “assessment of the whole picture” from which the totality of the circumstances “yield[s]” the fair probability of criminal activity required to establish probable cause. See *United States v. Cortez*, 449 U.S. 411, 418 (1981) (describing a totality analysis of suspicion in the context of a *Terry*-stop of a vehicle). Further, the Court has recognized that it may be good practice for trial courts to consider whether facts or circumstances exist that, when taken in the totality, *reduce* an officer’s suspicion of criminal activity. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 28 (1968) (describing with approval the investigating officer’s detailed observations of Terry and his two companions as a basis for the officer’s suspicion that the three men were planning an armed robbery, explaining that nothing in the men’s conduct, either before or after the officer confronted them, “negate[d]” the officer’s suspicion or “dispel[led]” the officer’s reasonable belief that criminal activity was afoot).



The Court has carefully guarded the requirement that suspicion be determined through a totality analysis of the issue. When a totality analysis is called for under the Fourth Amendment, the Court *requires* a case-by-case determination of the facts and circumstances relevant to that issue, and has rejected the use of a “blanket exception” that dispensed with the trial court’s totality consideration of suspicion. *See Richards v. Wisconsin*, 520 U.S. 385, 392, 394 (1997) (requiring a case-by-case determination of whether reasonable suspicion exists to dispense with the Fourth Amendment’s knock-and-announce requirement in felony drug cases).

*Richards* stressed the importance of the totality analysis, explaining that “*it is the duty of a court confronted with the question*” to conduct a case-by-case determination of whether reasonable suspicion exists for officers to proceed with a no-knock entry – even though the Court agreed that grounds for dispensing with knock and announce would “*frequently*” be present in felony drug cases. *Id.* at 394 (emphasis added). *Richards* therefore chose to maintain the integrity of the totality analysis, even at a cost to judicial efficiency. Two reasons for this protective treatment appear in the cases. First, a probable-cause determination is inextricably linked to the totality analysis that reveals it, such that limiting the analysis risks redefining probable cause itself. *See Arvizu*, 534 U.S. at 275 (explaining that the lower court’s “methodology”, *id.* at 268, in “delimit[ing]” consideration of certain factors in a totality analysis



of reasonable suspicion risked “seriously undercut[ting] the totality of the circumstances principle which governs the existence *vel non* of reasonable suspicion.”) (internal quotation marks omitted).

Second, creating an exception to the totality analysis in one case opens the door to further inroads on this foundational legal principle in others. As the Court explained in rejecting a “firearm exception” to the totality analysis under *Terry*, “the reasons for creating an exception in one category of Fourth Amendment cases can, relatively easily, be applied to others, thus allowing the exception to swallow the rule.” *Florida v. J.L.*, 529 U.S. 266, 273 (2000) (quoting *Richards*, 520 U.S. at 393-94) (internal quotation marks and brackets omitted). Therefore, the Court has been wary of limitations on a trial court’s authority to conduct a totality analysis of suspicion, and has rejected such limitations regardless of whether it was framed as a “rule”, *Richards*, 520 U.S. at 393, an “exception”, *J.L.*, 529 U.S. at 273, or a “delimit[ed] . . . consideration”, *Arvizu*, 534 U.S. at 275.

**B. The State's "Credentials Alone" Canine-Reliability Test Violates the Fourth Amendment Because It Isolates Individual Factors For Trial Court Consideration - Training or Certification - and Limits Trial Courts From Considering Other Probative Factors - i.e., Field-Performance Records - Which Is Contrary To the Totality-of-the-Circumstances Analysis Required To Establish Probable Cause**

Although the State was careful to avoid characterizing its "credentials alone" canine-reliability test as an exception to the totality-of-the-circumstances analysis, there can be no doubt but that it is. The State's position was clear that a drug-detection dog's reliability for contraband detection must be "deemed conclusive" on the basis of the dog's training or certification alone.<sup>5</sup> Pet'r Br., at 32; *see also id.* at 22, 24. The State's proposed limitation would force courts to

---

<sup>5</sup> Although the State left open a basis for rebutting this conclusion - limiting rebuttal to those drug-detection dogs that received their certification from so-called "sham" certifying organizations, *see* Pet'r Br., at 24, 33 n.7 - these grounds are extraordinarily narrow and likely unprovable. *See infra*, at 24-25. In practical terms, the State's canine-reliability limitation is therefore an *exception* to the required totality analysis. Even if one were instead to style the State's limitation as a "presumption," it is a conclusive presumption (with respect to any canine-reliability argument other than the dog's certification by a "sham" organization) - which, again, amounts to an exception. Because the State's canine-reliability test operates as an exception to the totality analysis, it has been treated as such here.

make probable-cause determinations based solely on evidence the State believes is helpful to its case (evidence of training or certification), without hearing the other side – facts or circumstances that, when viewed in their totality, may call into question a particular dog’s reliability for contraband detection in the field.<sup>6</sup>

Despite the State’s recognition that a totality-of-the-circumstances assessment is the applicable legal analysis, *see* Pet’r Br., at 13, 14, the State remained silent on how its “credentials alone” canine-reliability test can be reconciled with the very totality analysis that the State admitted must control.<sup>7</sup> The State cannot use its burden of proof as cover for foreclosing the required totality analysis, especially where the State’s rigid evidentiary limitation directly contradicts *Gates*’s assurance that trial courts retain discretion to examine the reliability of the information on which those courts base their probable-cause determinations. *See Gates*, 462 U.S. at 240 (“[U]nder our

---

<sup>6</sup> While the State’s “credentials alone” standard would seemingly allow trial courts to consider *other* facts associated with the vehicle-search (aside from the drug-detection dog’s reliability), probable cause to conduct a warrantless vehicle-search is based in most cases on a drug-detection dog’s positive alert to the vehicle. Therefore, probable cause in most warrantless vehicle-search cases, for all intents and purposes, collapses into a canine-reliability determination.

<sup>7</sup> The United States avoided mention of the totality-of-the-circumstances analysis altogether in its *amicus* brief. *See generally* Br. for the U.S. as *Amicus Curiae* Supp. Pet’r [hereinafter U.S. Br.].

opinion magistrates *remain perfectly free* to exact such assurances as they deem necessary, as well as those required by this opinion, in making probable-cause determinations.”) (emphasis added). The Florida Supreme Court’s thorough explanation of the additional, probative canine-reliability evidence that that court “deem[ed] necessary”, *see id.*, to perform a totality analysis of probable cause was reasonable based on the particularized circumstances in Florida.

The State’s “credentials alone” canine-reliability test is based on an overgeneralized assertion – that *all* trained or certified drug-detection dogs are reliable in the field, and that therefore, a totality analysis of canine reliability is unnecessary. First, the premise behind this overgeneralized claim is inaccurate, both scientifically and intuitively (measured from a “common-sense” perspective, such as *Gates* reminded courts to apply, *see Gates*, 462 U.S. at 238). Part I.C., *infra*, considers applicable scientific studies and detector dog-industry literature that demonstrate the reasonableness of the Florida Supreme Court’s request for additional, probative canine-reliability information.

Second, the State’s overgeneralized assertion mistakenly assumes that an exception to the totality analysis need only be supported by the same fair-probability burden of proof that is required to establish probable cause. The Court has been clear that an exception to the totality analysis must be

supported by much more. In *Richards*, for example, the Court considered whether an exception to a totality analysis of suspicion in felony drug cases – one that would allow officers to dispense with the Fourth Amendment’s knock-and-announce requirement – was supportable. See *Richards*, 520 U.S. at 391-92. In considering the exception, *Richards* recognized that grounds for officers to proceed on a no-knock basis – danger to the officer or danger that evidence will be destroyed – would “frequently” be present in felony drug investigations. *Id.* at 394.

Even though “frequent[ ]” circumstances could arguably describe a fair-probability occurrence, *Richards* made no attempt to base its analysis on the frequency with which grounds to dispense with knock and announce might occur. Instead, *Richards* required a case-by-case determination of suspicion because the proposed exception “contain[ed] considerable overgeneralization” – in that danger necessitating a no-knock entry is not present in *every* felony drug case. *Id.* at 393 (expressing the additional concern that exceptions to a case-by-case determination of suspicion could “relatively easily” be extended to other dangerous crimes, see *id.* at 394). Therefore, supporting the State’s proposed exception to the totality analysis with the State’s fair-probability burden of proof is a red herring. The State’s limitation on canine-reliability evidence must instead be examined for overgeneralization. See *id.* at 393. As discussed in Part I.C., *infra*, the State’s premise – that an exception

to a case-by-case determination of canine-reliability is proper because *all* trained or certified drug-detection dogs are reliable – contains “considerable overgeneralization.” See *id.* Even assuming *arguendo* that trained or certified drug-detection dogs are “frequently” reliable, it is simply hyperbole to suggest that trained or certified dogs are reliable in the field “*in each case*”. See *id.* at 394 (emphasis added).

Additionally, the State compounds the rigidity of its canine-reliability safe-harbors with the troubling proposition that trial courts should simply accede to law-enforcement determinations of canine reliability.<sup>8</sup> The State’s view is problematic because it removes the trial court as a neutral and detached check on law-enforcement decision-making<sup>9</sup> regarding an investigative technique that lacks the clear standards and national accreditation associated with, for example, blood testing performed by a nationally-accredited

---

<sup>8</sup> See Pet’r Br., at 24 (“The canine professionals – including K-9 officers – that train or certify dogs are in a far better position than the courts to determine the legitimacy of such training or certification.”); see also *id.* at 22-23.

<sup>9</sup> See, e.g., *Terry*, 392 U.S. at 21 (“The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge. . . .”); see also *Richards*, 520 U.S. at 394 (“[T]he fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to [knock and announce] in a particular case.”).



laboratory, and which is subject to documented vulnerabilities in implementation<sup>10</sup> that could skew the probable-cause determination in a given case. A trial court's review of an officer's decision to conduct a warrantless vehicle-search becomes a mere formality if the trial court is prohibited from considering additional probative canine-reliability information.

*The State of Florida Would Impose a "Certainty" Burden of Proof On Other Canine-Reliability Evidence:* Although the State applies a fair-probability burden in its own case, the State mistakenly requires "certainty" that other canine-reliability evidence – i.e., field-performance records – would change the outcome of the "credentials alone" canine-reliability determination before that additional information could be considered. *See, e.g.,* Pet'r Br., at 25-26 ("Field performance records are not necessary. . . . [because] [f]ield activity reports are by no means the full measure – nor even the most meaningful gauge – of a dog's reliability."); *see also* U.S. Br., at 15 ("[T]he only way to evaluate the dog's reliability is in a controlled setting where it can be definitely determined whether or not the dog's alert occurred in the presence of such an odor [the odor of drugs].").

In application, the State's canine-reliability limitation would function as a prosecution-oriented variant of the "divide-and-conquer" analysis that the

---

<sup>10</sup> *See infra*, at 23-34.

Court rejected in *Arvizu*. See 534 U.S. at 274. There, the lower court erred when it isolated each of the facts that led to a border patrol agent's *Terry*-stop of a vehicle and excluded from consideration any fact that, taken alone, the court believed was explainable and therefore not suspicious. *Id.* at 272-73. In rejecting the lower court's "methodology", *id.* at 268, *Arvizu* refused to require the government to prove that each factor, in isolation, was suspicious, or that any particular factor was determinative of suspicion before the trial court could consider it in a totality analysis. See *id.* at 277 ("Undoubtedly, each of these factors alone is susceptible to innocent explanation, and some factors are more probative than others.").

In this new variant of *Arvizu*, the State "divide[s]" by assigning a certainty burden of proof to the evidence the State opposes for consideration in the totality analysis, while reserving for the State the more modest fair-probability burden for its "credentials alone" canine-reliability test. *Cf.* 534 U.S. at 274. By assigning what is close to an impossible burden of proof, the "conquer[ing]" becomes a foregone conclusion once the "divid[ing]" has been done. *Cf. id.* The State cannot have it both ways. Although the probative value of canine-reliability evidence will vary from case-to-case, the Court has never required that probative evidence be proven to a certainty before trial courts may consider it in a totality analysis of suspicion. See *id.* at 277.

A totality analysis requires trial courts to consider the facts and circumstances in their totality (both

pro and con) in determining whether a fair probability of criminal activity exists. *See Terry*, 392 U.S. at 28. Isolating factors and limiting trial courts to consideration of only those factors (to the exclusion of other probative evidence) is incompatible with a totality analysis of probable cause.

**C. Under the Circumstances, the Florida Supreme Court's Request For Additional Probative Canine-Reliability Information For Consideration In a Totality Analysis of Probable Cause Was Reasonable**

The State's "credentials alone" canine-reliability test is based on an overgeneralized assertion – that *all* trained or certified drug-detection dogs are reliable in the field. Rather than certainty that other canine-reliability information – i.e., field-performance records – would change the outcome of a "credentials alone" reliability determination, instead, the Florida Supreme Court's request for additional probative canine-reliability evidence must be reasonable. Under the particularized circumstances presented in Florida, the Florida Supreme Court's request for additional information was reasonable.

# **1. Differences in Canine Drug-Detection Training and Certification Support the Reasonableness of the Florida Supreme Court's Case-by-Case Reliability Determination**

A simple recital that a drug-detection dog is “certified” does not *on its own* establish the dog’s reliability for contraband detection in the field. Training and certification standards vary widely between private vendors that certify drug-detection dogs. *Matheson v. State*, 870 So.2d 8, 14 (Fla. Ct. App. 2 Dist. 2003) (comparing government and private certification differences). For instance, some agencies require 100% accuracy, while others only 70% accuracy. See, e.g., United States Police Canine Assoc., Inc., *Certification Rules and Regulations* 17 (2012) (certifying drug-detection dogs scoring 140 out of 200, which is 70%) [hereinafter USPCA Rules], available at <http://www.uspcak9.com/certification/USPCARulebook2012.pdf> (last visited Aug. 27, 2012); compare also National Police Canine Assoc., *Standards for Training & Certifications Manual* 6 (2011) (certifying drug-detection dogs that find three of four “hides”, which is 75%) [hereinafter NPCA Standards], available at <http://www.npca.net/Files/Standards/Standards.pdf> with North American Police Working Dog Assoc., *Bylaws and Certification Rules* 22 (2011) (certifying drug-detection dogs that find eleven of twelve “hides”, which is 92%) [hereinafter NAPWDA Bylaws], available at <http://www.napwda.com/uploads/bylaws-cert-rules.pdf> (last visited Aug. 27, 2012). Thus, even were these divergent, canine-certification standards to be considered from a “best practices”

standpoint – rather than simply comparing them for uniformity – some private vendors' standards are better, sometimes much better, than others.

In addition to disagreement regarding certification standards, vast differences in the various agencies's methodology abound, including (1) the length of pre-certification training, *see Matheson*, 870 So.2d at 14 (describing that some training and certification sessions take twelve weeks, but others last only thirty days); (2) the length of time that must pass before a non-qualifying drug-detection team can try again to obtain certification, *compare* NPCA Standards, *supra*, at 6 (2011) (five days) *with* National Narcotic Detector Dog Assoc., *Narcotic Detection Standards* 1, 2 (2008) [hereinafter NNDDA Detection], *available at* [http://www.nndda.org/official-docs/doc\\_view/2-narcotics-detection-standard?tmpl=component&format=raw](http://www.nndda.org/official-docs/doc_view/2-narcotics-detection-standard?tmpl=component&format=raw) (thirty days); and (3) the amount of contraband that the drug-detection dog is trained to locate, *compare* NAPWDA Bylaws, *supra*, at 22 (2011) ("The amount of narcotic substance used for testing will not be less than one (1) gram") *with* NNDDA Detection, *supra*, at *id.* (minimum amount of cocaine is ten grams).

If the differences between the various certification standards and methodologies were not enough to support the Florida Supreme Court's request for explanatory information, then perhaps a *similarity* between certifying agencies will carry the day. Certifications are given to canine drug-detection *teams* – which consist of the specific human officer who obtained the certification (thus, not simply a generic human handler) and the individual drug-detection dog.

NNDDA Detection, *supra*, at 1 (certifying canine teams); NPCA Standards, *supra*, at 6 (certifying “K-9 Teams”); USPCA Rules, *supra*, at 13 (“The certification is for the team – handler and dog. If the dog has multiple handlers, each handler has to certify as a team with the dog.”). Importantly, when a drug-detection dog receives a new human handler, the team’s certification *lapses*. See, e.g., NAPWDA Bylaws, *supra*, at 23 (“If the dog changes handlers, a new team exists and the team will need to be certified.”).

Certification of drug-detection *teams*, not simply *dogs*, represents the gold standard for canine drug-detection. It is apparently one of the few things about which the industry is in agreement. See, e.g., U.S. Dep’t of the Army, Field Manual No. 3-19.17, *Military Working Dogs* ¶ 2-35, at 2-7 (2005) (“Certification of an MWD [Military Working Dog] and handler is valid for one year and is immediately nullified when . . . [t]he dog is assigned to another handler.”). Yet, in this case, Aldo and Aldo’s human handler were *never* certified together as a team. See Resp’t Br., at 1-2, 11, 43. In fact, even Aldo’s certification *with his prior handler* had expired months earlier. *Id.* at 1-2. Thus, based on the industry’s own standards, the sniff conducted in this case required further information and explanation concerning the detection dog’s reliability for contraband detection in the field.

*Certification By a “Sham” Organization:* The State left open a possible rebuttal argument if the drug-detection dog was certified by a so-called “sham” certifying organization. See Pet’r Br., at 24, 33 n.7. The State provided no indication as to what a “sham”



certification might mean, nor did the case that the State cited for this proposition. *See id.* at 24, 33 n.7 (citing *United States v. Ludwig*, 641 F.3d 1242, 1251 (10th Cir. 2011)). In looking to the word itself for meaning, “sham” is defined as “counterfeit,” Webster’s New Dictionary 478 (2001), which therefore seemingly limits a defendant’s rebuttal to organizations that are false-fronts for certification puppy-mills. By creating such a narrowly-drawn opportunity for rebuttal, the State ensures that the circumstances of a detection dog’s training or certification will *never* be examined (since one must assume that the purchasing police group acted in good faith, and was therefore unaware that the certifying organization from which it purchased the dog was a sham).

## **2. Drug-Detection Dogs Are Trained To Alert To Volatile Molecules and Compounds That Are Not Unique To Contraband**

While the State quoted literary sources that touted the *power* of a dog’s nose, Pet’r Br., at 16-19, the more relevant literature – scientific studies that examine the specific odors to which drug-detection dogs alert – prove that drug-detection dogs alert to specific, volatile molecules or compounds that are themselves in no way illegal. Brief of *Amici Curiae* Fourth Amendment Scholars in Support of Respondent, at 18-30, *Florida v. Jardines*, cert. granted, 132 S. Ct. 995 (No. 11-564) (Jan. 6, 2012), 2012 WL 2641847 [hereinafter *Jardines* Scholars Br.]. Rather than detecting the contraband itself, instead, a

drug-detection dog reacts to specific noncontraband substances, which enables police to *infer* that contraband is *also* present. The police inferencing on which the canine-sniff technique relies is what produces the issue of the individual detection dog's reliability for contraband detection. Therefore, because drug-detection dogs alert to noncontraband molecules and compounds, rather than the drugs themselves, it is essential to determine whether detection dogs may mistakenly alert to lawful items that contain those same volatile substances, and if so, how often.

With cocaine, for example, research shows that drug-detection dogs alert to the volatile molecule, methyl benzoate – a breakdown product of cocaine – rather than cocaine itself. *See id.* at 19-20 (setting out scientific studies). Methyl benzoate is a sweet-smelling molecule that is a commonly-used ingredient in the perfume industry. *See id.* at 24. In order to evaluate meaningfully whether drug-detection dogs can be induced to alert to a *bottle* of perfume, or a *bottle* of other personal-use products that often contains methyl benzoate, further scientific research is essential, *see id.* at 24 n.14, notwithstanding the State's assertion in its *Jardines* Reply Brief that this issue has been laid to rest. Reply Brief for the State of Florida, at 6, *Florida v. Jardines*, cert. granted, 132 S. Ct. 995 (No. 11-564) (Jan. 6, 2012), 2012 WL 3132158 [hereinafter *Jardines* Pet'r Reply Br.].

In its *Jardines* Reply Brief, the State referenced a currency-contamination study, a review of which reveals only the most limited consideration of perfume. *See id.* at 6 (citing Kenneth G. Furton, et al.,

*Identification of Odor Signature Chemicals in Cocaine Using Solid Phase Microextraction-Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency*, 40 J. Chromatographic Sci. 147 (2002) [hereinafter Furton]). In the cited study, only *two* drug-detection dogs were exposed to a *single* methyl benzoate-containing perfume sample, and additionally, the study failed to disclose the volume of perfume to which the two dogs were exposed. *See id.* at 153, Table IV (Table IV reflects that, for every other substance to which the drug-detection dogs were exposed, the amount of that substance – aside from the perfume sample – was documented, *see id.*); *see also id.* at 154 (one methyl benzoate-containing perfume sample was used in the field test).

Without knowing whether the two dogs used in the field test were exposed to a spritz of perfume, or instead a more substantial volume – like a bottle – it is difficult to draw any conclusion (both because of the limited number of detection dogs tested as well as the failure to establish the volume of the perfume sample used). In fact, even the study's authors described this portion of the study as "limited field tests", *see id.* at 155, although the State nevertheless interpreted this limited study to be determinative of the issue. *See Jardines Pet'r Reply Br.*, at 6. The dearth of scientific study that considers whether drug-detection dogs can differentiate between cocaine and more-substantial sources of methyl benzoate, such as a bottle of perfume, is especially concerning because detection dogs may be trained, or have their field-training reinforced, using methyl benzoate-training

devices, not real cocaine. See *Jardines* Scholars Br., at 21, 21 n.11, 21 n.12; see also *id.* at 28-29. The concern that drug-detection dogs may alert to more substantial sources of methyl benzoate, like a bottle of perfume, is much more than hypothetical. Cf., e.g., *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 474 (5th Cir. 1982) (false-positive canine alert; student had a bottle of perfume in her purse).

### **3. Canine Alerts To So-Called Residual Odors Support the Reasonableness of the Florida Supreme Court's Case-By-Case Reliability Determination**

In *Harris*, the Florida Supreme Court expressed concern that drug-detection dogs may alert to residual odors, meaning that detection dogs may alert even though no contraband is actually present at the time law enforcement conducted the sniff. *Harris*, 71 So.3d at 769. Interestingly, residual-odor arguments have been used by law enforcement in two very different ways: (1) to seize currency, based upon the money's connection to drug-trafficking, and (2) as an explanation for what would otherwise be a false-positive canine alert in the field. In civil forfeiture proceedings, the government relies on the *rapid* evaporation rate of methyl benzoate (120 minutes) as a basis to seize currency, see, e.g., *United States v. Funds in the Amount of \$30,607*, 403 F.3d 448, 458 (7th Cir. 2005), thus making the rapid evaporation of the alert-producing molecule the *sword* the government uses to seize currency. On the other hand, in more traditional canine sniffs (i.e., vehicle-sniffs) canine-handlers

routinely testify that drug-detection dogs can alert to odors for as much as seventy-two hours, *see, e.g., State v. Cabral*, 859 A.2d 285, 300 (Md. Ct. Spec. App. 2004), making the extended period over which the volatile odors supposedly persist the *shield* that explains a positive canine-alert in the field when no drugs are found. The theories behind these two arguments are in tension with one another, and require further scientific study to determine whether both are, in fact, scientifically supportable.

As a defense in civil forfeiture proceedings, defendants argued a “currency contamination theory” – that a large percentage of United States currency is contaminated with cocaine, and is therefore capable of producing a positive canine alert even if the money had not recently been in contact with cocaine. *See, e.g., Caballes*, 543 U.S. at 411-12 (Souter, J., dissenting) (discussing “judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine.”). The government’s rebuttal to the currency-contamination defense relied on scientific research that established that drug-detection dogs alert to methyl benzoate, a breakdown product of cocaine, not to cocaine itself. *See Furton, supra*, at 155 (“[T]his study . . . confirm[s] that drug detector dogs alert to the common cocaine byproduct methyl benzoate rather than to the cocaine itself.”). Based on methyl benzoate’s high volatility, or rapid evaporation rate, a positive canine alert to currency established that the



money had recently been in contact with cocaine, making the currency seizable in a civil forfeiture proceeding. *See, e.g., Funds in the Amount of \$30,607*, 403 F.3d at 458.

Yet, law enforcement contends that the dissipation rate of residual odors is much slower when justifying a vehicle-sniff. *Harris*, 71 So.3d at 774. For instance, in *Cabral* the handler testified that residual odors – in that case heroin – can last as long as seventy-two hours. 859 A.2d at 300. In fact, the court there concluded that the detection dog's ability to detect an odor up to seventy-two hours-old actually demonstrated the superiority of the dog's nose. *Id.* at 300 (stating that the dog's ability to detect a seventy-two hour-old odor "strengthens the argument that the dog has a superior sense of smell on which to rely to support a finding of probable cause."). *Harris* correctly questioned *Cabral's* reasoning, stating that the residual-odor time delay may instead indicate that "a dog's inability to distinguish between residual odors and actual drugs undermines a finding of probable cause." *Harris*, 71 So.3d at 774.

#### **4. Concerns of Handler Error and Handler Cuing Support the Reasonableness of the Florida Supreme Court's Case-By-Case Reliability Determination**

The Florida Supreme Court also identified handler error and handler cuing as potential impediments to canine reliability. *Harris*, 71 So.3d at 769.



Handler error occurs when a handler erroneously interprets a drug-detection dog's ambiguous behavior in the field to be a positive alert to presence of contraband. *See id.* at 768-69. Handler cuing, on the other hand, occurs when a canine-handler either consciously or, more likely, unwittingly *induces* a drug-detection dog to alert positively in the field. *See id.* (quoting Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. 1, 5 (2006)).

Handler cuing generally occurs when the canine-handler believes that contraband is present at the sniff location and through words or conduct conveys that belief to the handler's canine partner. A recent scientific study establishes that handler cuing occurs far more often than was previously realized. *See* Lisa Lit, et al., *Handler beliefs affect scent detection dog outcomes*, 14 Animal Cognition 387, 392 (2011), *available at* <http://www.springerlink.com/content/j477277481125291/fulltext.pdf> (last visited Aug. 25, 2012) (finding that a canine-handler's belief that contraband is present at a particular "hide" – even though researchers, in fact, had hidden no drugs at the hide – influenced whether the drug-detection dog alerted positively to the presence of contraband). The Lit study described that canine-handlers telegraph the handler's belief that contraband is present by movements or posture, such as "pointing, gazing, head nodding in the direction of a target, glancing at a target and head turns toward a target. . . ." *Id.* at 388. Lit found that "handler beliefs affect working dog outcomes, and human indication of scent location affects distribution of alerts more than dog interest in a particular location." *Id.* at 393.

The Lit study was the object of considerable criticism by law enforcement agencies, private vendors, and affiliated associations, such as the Scientific Working Group on Dog and Orthogonal Detector Guidelines ("SWGDOG"). See *SWGDOG Membership Commentary on 'Handler beliefs affect scent detection dog outcomes'* by L. Lit, J.B. Schweitzer and A.M. Oberbauer (2011), available at [http://casgroup.fiu.edu/news/docs/2126/1302011268\\_SWGDOG\\_Response\\_to\\_Lit\\_Study.pdf](http://casgroup.fiu.edu/news/docs/2126/1302011268_SWGDOG_Response_to_Lit_Study.pdf). SWGDOG did not deny that handler cuing exists, but instead challenged Lit's methodology.

Ironically enough, SWGDOG's criticism of the Lit study was based, in part, on Lit's failure to obtain and use in her analysis the very information regarding canine reliability that the Florida Supreme Court sought below. See *id.* at 1-2 (claiming the study was flawed because, among other things, the study "did not indicate if the canine team's training records were reviewed to determine if the teams regularly engaged in documented maintenance training . . . "; did not include details about certification or certification standards, and whether certification conformed to best practices; and did not provide sufficient information about the canine-handler's level of experience). In essence, the SWGDOG industry-group used Lit's failure to include this information as a *sword* in its attempt to discredit Lit's conclusion that handler cuing was a bigger problem than had previously been realized.

Yet, the State used this very information as a *shield* here, claiming that it is "not necessary", Pet'r

Br., at 25, in determining canine reliability for contraband detection, and that the Florida Supreme Court's request for the information was based on "faulty factual assumptions", Pet'r Br., at 26. Even without reconciling these two views – Lit, on the one hand, and SWGDOG, on the other – it is apparent that the information the Florida Supreme Court sought below is *probative* of canine reliability for contraband detection in the field. The State's argument that courts must be *prohibited* from using information such as field-performance records in determining canine reliability asks us to suspend the very "common-sense" that *Gates* cautioned was paramount in determining probable cause. See *Gates*, 462 U.S. at 238.

##### **5. The Florida Supreme Court's Request For Additional Canine-Reliability Information Was Reasonable**

Under the circumstances, the Florida Supreme Court was reasonable in rejecting the "credentials alone" limitation on canine-reliability evidence. See *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (explaining that because "resident judges" are particularly aware of local conditions, their factual inferences in a totality analysis are afforded "due weight"). The State's overgeneralized assertion – that *all* trained or certified drug-detection dogs are reliable in the field – produces an outcome-determinative assessment of a positive canine alert, and therefore probable cause, that "relax[es] the fundamental requirements of probable cause." Cf. *Wong Sun v. United States*, 371 U.S. 471,

479 (1963). Further, the State's blanket rule sets the stage to "seriously undercut" the integrity of totality-of-the-circumstances determinations more generally. See *Arvizu*, 534 U.S. at 274. By creating an exception to the required totality analysis, the State's proposed canine-reliability limitation renders the magistrate's probable-cause determination "a rubber stamp" for the officer's decision to conduct a warrantless search of a vehicle. See *Aguilar v. Texas*, 378 U.S. 108, 111 (1964).

## **II. The Florida Supreme Court's Request For Additional Probative Canine-Reliability Evidence Was Necessary To Ensure That the Warrant Exception For Canine Sniffs of Luggage and Vehicles Is Adequately Supported By the Technique's Accuracy Justification**

Canine drug-detection sniffs of luggage and vehicles were accepted as non-searches based on the justifications for warrantless use of this investigative technique – limited intrusiveness and accuracy. *Place*, 462 U.S. at 707; *Caballes*, 543 U.S. at 409. The State relies on *Place* and *Caballes*, yet seeks a canine-reliability rule that contradicts the justifications that led the Court to create a warrant exception for canine sniffs of luggage and vehicles in the first place. The State cannot compel a canine-reliability test that so limits the trial court's consideration of the evidence that it "untether[s]" this warrant exception from the reasons that led the Court to create it. *Cf. Arizona*

*v. Gant*, 556 U.S. 332, 343 (2009). The justifications on which the Court relies in creating a warrant exception are not empty recitals that can later be ignored. *See id.* (refusing to extend *New York v. Belton*, 453 U.S. 454 (1981) to allow for a warrantless search of the passenger compartment of a vehicle under the search-incident-to-arrest exception to the warrant requirement after the arrestee is secured and therefore unable to access the vehicle's interior because *Belton's* safety justification no longer supported the warrantless search).

**A. The Warrant Exception For a Canine Sniff of Luggage and Vehicles Assumed the Accuracy of This Investigative Technique**

*Place* explained that a canine sniff of luggage was not a “search” under the Fourth Amendment because (1) the sniff was “much less intrusive than a typical search” – it did not require opening the luggage, which would “expose noncontraband items that otherwise would remain hidden from public view,” and (2) the information that the sniff revealed was “limited” in that it “disclosed only the presence or absence of narcotics, a contraband item.” 462 U.S. 696, 707 (1983). Based on the technique’s accuracy and limited intrusiveness, *Place* held that the canine sniff of luggage was not a search, and characterized the sniff as a “*sui generis*” investigative technique. *See Caballes*, 543 U.S. at 410 (Souter, J., dissenting) (observing that *Place's* characterization of the canine sniff of luggage



as “*sui generis*” was based on the limited intrusiveness of the sniff and its accuracy).

Thereafter, *Place*’s accuracy justification formed the basis of the Court’s holding in *United States v. Jacobsen*, 466 U.S. 109 (1984), which considered whether the warrantless field-testing of a white powder to determine if it was cocaine violated the Fourth Amendment when that powder was discovered by Federal Express employees and turned over to the U.S. Drug Enforcement Administration (DEA). *Id.* at 111. *Jacobsen* held that the field-testing of the white powder was not a search because the field test could reveal only whether the white powder was cocaine – of which a person lacks a legitimate expectation of privacy in its possession – but no other legitimately-private information about the powder, not even whether it was “sugar or talcum powder.” *Id.* at 122, 123.

*Jacobsen* likened the apparently perfect or near-perfect accuracy of the chemical field-testing, *see id.* at 123 (observing that “[i]t is probably safe to assume that *virtually all* of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding. . . .”) (emphasis added), to a canine drug-detection sniff of luggage. *Id.* at 124. In emphasizing the accuracy of both investigative techniques – the chemical field-testing and a canine sniff of luggage, *Jacobsen* characterized the likelihood that either technique might be wrong (and therefore reveal noncontraband items) as “much too



remote" to view the field test as a search under the Fourth Amendment. *Id.*<sup>11</sup>

*Jacobsen* further tied its holding to *Place*, explaining that *Place* "dictated" the result that the field test was not a search, *id.* at 123, because field-testing, like a canine sniff, could reveal "nothing about noncontraband items." *Id.* at 124 n.24. Therefore, in reliance on the similar accuracy of the two investigative techniques, *Jacobsen* concluded that chemical field-testing, like a canine drug-detection sniff of luggage, could reveal only the presence or absence of contraband, and accordingly, was not a search for Fourth Amendment purposes. *Id.* at 123. More recently in *Caballes*, the Court relied on both the accuracy and limited intrusiveness of the canine-sniff technique as the justifications for finding that a canine sniff of a lawfully-stopped vehicle was not a search. See 543 U.S. at 409 (explaining that a canine sniff of a vehicle "reveals no information other than the location of [contraband]").

Accuracy of the investigative technique was the foundation for *Jacobsen*'s non-search holding. See *Jacobsen*, 466 U.S. at 123 (observing that "virtually all" chemical testing of the white powder would have

---

<sup>11</sup> In comparing the chemical field test at issue to *Place*'s canine sniff of luggage, *Jacobsen* considered only *Place*'s accuracy justification because the Court considered separately the intrusiveness of the DEA agent's destruction of a minute amount of the white powder in performing the chemical field test. See *id.* at 125.

come to the same result and comparing the accuracy of the chemical field test to a canine drug-detection sniff of luggage). Further, *Jacobsen's* treatment of *Place's* accuracy justification makes clear that the warrant exception for a canine sniff of luggage was premised on the accuracy of the canine-sniff investigative technique too. *See id.* at 124 (assuming that the likelihood a canine drug-detection sniff of luggage might reveal noncontraband was “remote”).

**B. The Florida Supreme Court Carried Out Its Constitutional Obligation – Ensuring That the Canine-Sniff Technique’s Accuracy Justification Is Not Undermined**

Contrasting the State’s treatment of the canine-sniff technique in *Florida v. Jardines*, *see* Brief for the State of Florida, *Florida v. Jardines*, *cert. granted*, 132 S.Ct. 995 (No. 11-564) (Jan. 6, 2012), 2012 WL 1594294 [hereinafter *Jardines* Pet’r Br.], and in this case reveals that the State supports its arguments in these two cases using different interpretations of *Place's* conclusion that canine drug-detection sniffs “disclose[] only the presence or absence of narcotics. . . .” *See Place*, 462 U.S. at 707. In the State’s Merits Brief in *Jardines*, the State argued that drug-detection dogs alert only to the “presence” of contraband – meaning that contraband is actually there – and do not react to any other substances, a clear accuracy-based argument. *See, e.g., Jardines* Pet’r Br., at 17 (“When a drug-detection dog alerts, he conveys only the public fact that the house contains drugs.”).

In *Harris*, on the other hand, the State argues that “presence” also means that contraband was at the sniffed location at some earlier time (and thus left behind a residual odor). See, e.g., *Pet’r Br.*, at 31 (“The possibility that a dog could alert to a residual odor always exists in theory, and can never truly be eliminated.”). The State therefore seeks a broad reading of *Place*’s “presence” conclusion here, but advocates a fair-reading interpretation of *Place* in *Jardines*.

At a minimum, the State’s inconsistent positions regarding *Place*’s presence-of-contraband conclusion calls into question *Place*’s accuracy justification for warrantless canine sniffs. The State compounds the impact of its proposed broad reading of *Place* (that “presence” also includes residual odors) by barring courts from considering in their canine-reliability determinations the very circumstances that made the State’s proposed broad reading of *Place* necessary in the first place. When a fair-probability standard for purposes of determining probable cause is applied to what can potentially be a “C” canine-student under Florida’s unregulated system of canine drug-detection training and certification (some private vendors certify detection dogs that attain only a 70% accuracy rate<sup>12</sup>), then the technique’s accuracy justification risks being undermined. The Florida Supreme Court’s request for additional, probative canine-reliability evidence was necessary to ensure

---

<sup>12</sup> See, e.g., USPCA Rules, *supra*, at 17 (requiring 70% accuracy to qualify for certification); see also NPCA Standards, *supra*, at 6 (requiring 75% accuracy for certification).

that the warrant exception for canine sniffs of luggage and vehicles remains "[ ]tether[ed]" to its justifications. *Cf. Gant*, 556 U.S. at 343.

---

### CONCLUSION

For the reasons stated above, the Florida Supreme Court's decision must be affirmed.

Respectfully submitted,

LESLIE A. SHOEBOTHAM

Associate Professor of Law

*Counsel of Record*

LOYOLA UNIVERSITY NEW ORLEANS

COLLEGE OF LAW

7214 St. Charles Ave.

New Orleans, LA 70118

(504) 861-5683

shoeboth@loyno.edu

**APPENDIX**  
**LIST OF *AMICI CURIAE***

Janet E. Ainsworth  
John D. Eshelman Professor of Law  
Seattle University

Robert Batey  
Professor of Law  
Stetson University College of Law

Tamar R. Birckhead  
Associate Professor of Law  
University of North Carolina School of Law

Shawn Marie Boyne, J.D., Ph.D.  
Associate Professor of Law  
Indiana University  
Robert H. McKinney School of Law

Sandra J. Carnahan  
Professor of Law  
South Texas College of Law

Leonard L. Cavise  
Professor of Law  
DePaul College of Law

Daniel T. Coyne  
Clinical Professor of Law  
IIT/Chicago-Kent College of Law

J. Amy Dillard  
Associate Professor of Law  
University of Baltimore School of Law

Dolores A. Donovan  
Professor of Law  
Director, USF Center for Law and Global Justice  
University of San Francisco School of Law

Steven B. Duke  
Professor of Law  
Yale Law School

Ian P. Farrell  
Assistant Professor of Law  
University of Denver  
Sturm College of Law

Bruce C. French  
Professor of Law  
Ohio Northern University College of Law

Patrice A. Fulcher  
Associate Professor of Law  
Atlanta's John Marshall Law School

Brian R. Gallini  
Associate Professor of Law  
University of Arkansas School of Law – Fayetteville

Thaddeus Hoffmeister  
Associate Professor of Law  
University of Dayton School of Law

Sandra D. Jordan  
Professor of Law  
Charlotte School of Law

Arthur G. LeFrancois  
Professor of Law  
Oklahoma City University School of Law

Richard A. Leo, Ph.D., J.D.  
Associate Professor of Law  
Dean's Circle Research Scholar  
University of San Francisco School of Law



Arnold H. Loewy  
George Killam Professor of Criminal Law  
Texas Tech School of Law

Michael J. Zydney Mannheimer  
Professor of Law  
Salmon P. Chase College of Law  
Northern Kentucky University

Lynn McDowell  
Director of Clinical Programs  
Florida Coastal School of Law

Colin Miller  
Associate Professor of Law  
University of South Carolina School of Law

Louis M. Natali, Jr.  
Professor of Law  
Temple University  
Beasley School of Law

Ira P. Robbins  
Barnard T. Welsh Scholar and  
Professor of Law and Justice  
American University, Washington College of Law

Amy D. Ronner  
Professor of Law  
St. Thomas University School of Law

Josephine Ross  
Associate Professor of Law  
Howard University School of Law

Albert E. Scherr  
Professor of Law  
University of New Hampshire School of Law

William A. Schroeder  
Professor of Law  
Southern Illinois University

Dru Stevenson  
Hutchins Research Professor of Law  
South Texas College of Law

David Swank  
David Ross Boyd Professor of Law  
University of Oklahoma College of Law

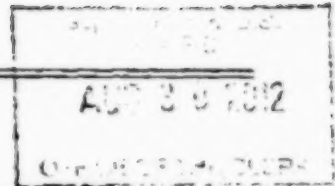
Rodney J. Uphoff  
Elwood Thomas Missouri Endowed Professor of Law  
Director, University of Missouri South African  
Educational Program  
University of Missouri School of Law

James Etienne Viator  
Adams & Reese Distinguished Professor of Law  
Loyola University New Orleans College of Law

April J. Walker  
Associate Professor of Law  
Thurgood Marshall School of Law  
Texas Southern University

---

**AMICUS  
CURIAE  
BRIEF**



In The  
**Supreme Court of the United States**

---

STATE OF FLORIDA,

*Petitioner,*

v.

CLAYTON HARRIS,

*Respondent.*

---

On Writ Of Certiorari To  
The Supreme Court Of Florida

---

**BRIEF OF AMICUS CURIAE  
INSTITUTE FOR JUSTICE  
IN SUPPORT OF RESPONDENT**

---

INSTITUTE FOR JUSTICE  
WILLIAM H. MELLOR  
SCOTT G. BULLOCK  
DARPANA M. SHETH  
*Counsel of Record*  
ROBERT P. FROMMER  
901 North Glebe Road, Suite 900  
Arlington, VA 22203  
Tel.: (703) 682-9320  
E-mail: [wmellor@ij.org](mailto:wmellor@ij.org), [sbullock@ij.org](mailto:sbullock@ij.org),  
[dsheth@ij.org](mailto:dsheth@ij.org), [rfrommer@ij.org](mailto:rfrommer@ij.org)

*Counsel for Amicus Curiae*

## TABLE OF CONTENTS

|                                                                                                                                                                                                                                    | Page |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| TABLE OF AUTHORITIES .....                                                                                                                                                                                                         | iii  |
| INTEREST OF THE <i>AMICUS CURIAE</i> .....                                                                                                                                                                                         | 1    |
| SUMMARY OF ARGUMENT .....                                                                                                                                                                                                          | 2    |
| ARGUMENT .....                                                                                                                                                                                                                     | 4    |
| I. Adopting a <i>Per Se</i> Rule That an Officer's Perception of a Positive Alert by a "Trained" or "Certified" Narcotics-Detection Dog Establishes Probable Cause Conflicts with Well-Established Fourth Amendment Precedent..... | 6    |
| II. Civil-Forfeiture Laws Constitute One of the Most Serious Assaults on Private-Property Rights Today.....                                                                                                                        | 15   |
| A. Civil forfeiture has expanded dramatically and become unmoored from its original justifications as envisioned by the founding generation.....                                                                                   | 17   |
| B. The ability of law enforcement to retain civil-forfeiture proceeds inexorably has led to "policing for profit" .....                                                                                                            | 22   |
| C. The meteoric rise in forfeitures has skewed legitimate law-enforcement priorities, creating self-financing agencies and systemic abuse.....                                                                                     | 28   |

## TABLE OF CONTENTS – Continued

|                                                                                                                                                                                                         | Page |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| III. Permitting a Finding of Probable Cause Based Solely on an Officer's Perception of a Positive Dog Alert Would Exacerbate Forfeiture Abuse, Threatening the Property Rights of Innocent Owners ..... | 33   |
| A. Narcotics-detection dogs and their handlers are not inherently unbiased, reliable "divining rods" for drugs .....                                                                                    | 34   |
| B. Triggering civil-forfeiture proceedings based on nothing more than a positive dog alert would threaten innocent owners' property .....                                                               | 37   |
| CONCLUSION.....                                                                                                                                                                                         | 41   |



## TABLE OF AUTHORITIES

|                                                                                     | Page              |
|-------------------------------------------------------------------------------------|-------------------|
| CASES                                                                               |                   |
| <i>Alvarez v. Smith</i> , 558 U.S. 87 (2009) .....                                  | 1                 |
| <i>Bennis v. Michigan</i> , 516 U.S. 442 (1996) .....                               | 1                 |
| <i>The Brig Malek Adhel</i> , 43 U.S. 210 (1844) .....                              | 18                |
| <i>Brinegar v. United States</i> , 338 U.S. 160 (1949) .....                        | 8, 9              |
| <i>Carroll v. United States</i> , 267 U.S. 132 (1925) .....                         | 8, 18             |
| <i>Florida v. Royer</i> , 460 U.S. 491 (1983) .....                                 | 11, 12            |
| <i>Harris v. State</i> , 71 So. 3d 756 (Fla. 2011) .....                            | 2, 7, 8, 10       |
| <i>Illinois v. Gates</i> , 462 U.S. 213 (1983) ....                                 | 8, 10, 15, 35, 36 |
| <i>In re Forfeiture of \$18,000</i> , 471 N.W.2d 628<br>(Mich. Ct. App. 1991) ..... | 40                |
| <i>Jacobson v. \$55,900 in U.S. Currency</i> , 728<br>N.W.2d 510 (Minn. 2007) ..... | 40                |
| <i>Locke v. United States</i> , 11 U.S. (7 Cranch) 339<br>(1813) .....              | 9                 |
| <i>Maryland v. Pringle</i> , 540 U.S. 366 (2003) .....                              | 9                 |
| <i>The Palmyra</i> , 25 U.S. 1 (1827) .....                                         | 18                |
| <i>Sackett v. Env'tl. Prot. Agency</i> , 132 S. Ct. 1367<br>(2012) .....            | 1                 |
| <i>State of Kansas v. Barker</i> , 850 P.2d 885 (Kan.<br>1993) .....                | 14                |
| <i>State of Tennessee v. England</i> , 19 S.W.3d 762<br>(Tenn. 2000) .....          | 14                |

## TABLE OF AUTHORITIES – Continued

|                                                                                                                        | Page  |
|------------------------------------------------------------------------------------------------------------------------|-------|
| <i>State of Utah v. Seventy-Three Thousand One Hundred Thirty Dollars U.S. Currency</i> , 31 P.3d 514 (Utah 2001)..... | 40    |
| <i>United States v. \$242,484.00</i> , 389 F.3d 1149 (11th Cir. 2004) ( <i>en banc</i> ).....                          | 6, 12 |
| <i>United States v. Cortez</i> , 449 U.S. 411 (1981).....                                                              | 8     |
| <i>United States v. Diaz</i> , 25 F.3d 392 (6th Cir. 1994).....                                                        | 14    |
| <i>United States v. James Daniel Good Real Prop.</i> , 510 U.S. 43 (1993).....                                         | 1, 15 |
| <i>United States v. Jones</i> , 132 S. Ct. 945 (2012).....                                                             | 15    |
| <i>United States v. Ligenfelter</i> , 997 F.2d 632 (9th Cir. 1993).....                                                | 14    |
| <i>United States v. Limares</i> , 269 F.3d 794 (7th Cir. 2001).....                                                    | 14    |
| <i>United States v. Lot 9, Block 2 of Donnybrook Place</i> , 919 F.2d 994 (5th Cir. 1990).....                         | 6     |
| <i>United States v. Outlaw</i> , 134 F. Supp. 2d 807 (W.D. Tex. 2001).....                                             | 14    |
| <i>United States v. The Schooner Little Charles</i> , 1 Brock. 347 (C.C.D.Va. 1819).....                               | 18    |
| <i>United States v. Thomas</i> , 913 F.2d 1111 (4th Cir. 1990).....                                                    | 6     |
| <i>Ybarra v. Illinois</i> , 444 U.S. 85 (1979).....                                                                    | 11    |

## TABLE OF AUTHORITIES – Continued

|                                                                                                                                                                                                                                                                                                                  | Page     |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| CONSTITUTIONAL PROVISIONS                                                                                                                                                                                                                                                                                        |          |
| Fourth Amendment, U.S. Const. amend. IV .....                                                                                                                                                                                                                                                                    | 8        |
| NEB. CONST. art. VII, § 5.....                                                                                                                                                                                                                                                                                   | 26       |
| CODES AND STATUTES                                                                                                                                                                                                                                                                                               |          |
| Act of July 31, 1789, 1 Stat. 29 (1789).....                                                                                                                                                                                                                                                                     | 17       |
| Civil Asset Forfeiture Reform Act of 2000, Pub.<br>L. No. 106-185, 114 Stat. 202 (2000) .....                                                                                                                                                                                                                    | 20       |
| Comprehensive Crime Control Act of 1984,<br>Pub. L. No. 98-473, 98 Stat. 1837 (1984) .....                                                                                                                                                                                                                       | 19, 20   |
| 21 U.S.C. § 881(a)(7).....                                                                                                                                                                                                                                                                                       | 19       |
| 28 U.S.C. § 524(c)(1)(F)(i), (c)(1)(I).....                                                                                                                                                                                                                                                                      | 20       |
| OTHER PUBLICATIONS                                                                                                                                                                                                                                                                                               |          |
| Asset Forfeiture and Money Laundering Sec-<br>tion, U.S. Dep't of Justice Criminal Div., SE-<br>LECTED FEDERAL ASSET FORFEITURE STATUTES<br>(2006), <i>available at</i> <a href="http://www.justice.gov/criminal/foia/docs/afstats06.pdf">http://www.justice.gov/<br/>criminal/foia/docs/afstats06.pdf</a> ..... | 19       |
| <i>Clever Hounds</i> , THE ECONOMIST (Feb. 15, 2011),<br><a href="http://www.economist.com/blogs/babbage/2011/02/animal_behaviour">http://www.economist.com/blogs/babbage/2011/<br/>02/animal_behaviour</a> .....                                                                                                | 36       |
| David B. Smith, PROSECUTION AND DEFENSE OF<br>FORFEITURE CASES (2012) .....                                                                                                                                                                                                                                      | 6, 7, 30 |

## TABLE OF AUTHORITIES – Continued

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Page       |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
| Dick M. Carpenter II, Ph.D., Larry Salzman & Lisa Knepper, INEQUITABLE JUSTICE: HOW “EQUITABLE SHARING” ENCOURAGES LOCAL POLICE AND PROSECUTORS TO EVADE STATE CIVIL FORFEITURE LAW FOR FINANCIAL GAIN (2011), <i>available at</i> <a href="http://www.ij.org/images/pdf_folder/private_property/forfeiture/inequitable_justice-mass-forfeiture.pdf">http://www.ij.org/images/pdf_folder/private_property/forfeiture/inequitable_justice-mass-forfeiture.pdf</a> ..... | 23, 25, 27 |
| Erin Norman & Anthony Sanders, FORFEITING ACCOUNTABILITY: GEORGIA LAW ENFORCEMENT’S HIDDEN CIVIL FORFEITURE FUNDS (2011), <i>available at</i> <a href="http://www.ij.org/forfeiting-accountability-2">http://www.ij.org/forfeiting-accountability-2</a> .....                                                                                                                                                                                                          | 30         |
| Exec. Office for U.S. Attorneys, U.S. Dep’t of Justice, 38 United States Attorneys’ Bulletin 180 (1990).....                                                                                                                                                                                                                                                                                                                                                           | 29         |
| George Mason, <i>Fairfax County Freeholders’ Address and Instructions to Their General Assembly Delegates</i> (May 30, 1783), in Jeff Broadwater, GEORGE MASON: FORGOTTEN FOUNDER (2006).....                                                                                                                                                                                                                                                                          | 29         |
| Henry Hyde, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? (1995).....                                                                                                                                                                                                                                                                                                                                                                            | 38         |
| James Buchanan & Gordon Tullock, THE CALCULUS OF CONSENT (1962).....                                                                                                                                                                                                                                                                                                                                                                                                   | 32         |
| James R. Maxeiner, <i>Bane of American Forfeiture Law: Banished at Last?</i> 62 CORNELL L. REV. 768 (1977).....                                                                                                                                                                                                                                                                                                                                                        | 17         |

## TABLE OF AUTHORITIES – Continued

|                                                                                                                                                                                                                                                                                                                                                                | Page              |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|
| Jefferson E. Holcomb, Ph.D., Tomislav V. Kovandzic, Ph.D. & Marian R. Williams, Ph.D., <i>Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States</i> , 39 J. OF CRIM. JUSTICE 273 (2011).....                                                                                                                                 | 26, 27, 29        |
| John L. Worrall, <i>Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement</i> , 29 J. CRIM. JUST. 171 (2001) .....                                                                                                                                                                             | 29                |
| Leonard W. Levy, A LICENSE TO STEAL. THE FORFEITURE OF PROPERTY (1996) .....                                                                                                                                                                                                                                                                                   | 18, 32            |
| Lisa Lit et al., <i>Handler beliefs affect scent detection dog outcomes</i> , 14 ANIMAL COGNITION 387 (2011) .....                                                                                                                                                                                                                                             | 36                |
| Marian R. Williams, Ph.D., Jefferson E. Holcomb, Ph.D., Tomislav V. Kovandzic, Ph.D. & Scott Bullock, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 22 (2010), available at <a href="http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf">http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf</a> ..... | 7, 21, 27, 28, 31 |
| Nicole Benson, <i>NHP Troopers Sue Department Over K-9 Program</i> , KLAS-TV, Jun. 26, 2012, available at <a href="http://www.8newsnow.com/story/18886948/2012/06/26/nhp-troopers-sue-department-over-k-9-program">http://www.8newsnow.com/story/18886948/2012/06/26/nhp-troopers-sue-department-over-k-9-program</a> .....                                    | 32                |
| Patrick Strawbridge, <i>Police Oppose Drug-Cash Plan</i> , THE OMAHA WORLD-HERALD, May 1, 1999 .....                                                                                                                                                                                                                                                           | 26                |

## TABLE OF AUTHORITIES – Continued

|                                                                                                                                                                                                                                                                                                                                                                                                | Page   |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| Patty Henetz, <i>Prosecutors, Police Reluctantly Comply With Asset Seizure Law</i> , THE ASSOCIATED PRESS STATE & LOCAL WIRE, July 17, 2003 .....                                                                                                                                                                                                                                              | 30, 31 |
| Radley Balko, <i>The Forfeiture Racket</i> , REASON (Jan. 26, 2010), <a href="http://reason.com/archives/2010/01/26/the-forfeiture-racket">http://reason.com/archives/2010/01/26/the-forfeiture-racket</a> .....                                                                                                                                                                               | 39     |
| Radley Balko, <i>Illinois Traffic Stop of Star Trek Fans Raises Concerns About Drug Searches, Police Dogs, Bad Cops</i> , THE HUFFINGTON POST (Mar. 31, 2012), <a href="http://www.huffingtonpost.com/2012/03/31/drug-search-trekies-stopped-searched-illinois_n_1364087.html">http://www.huffingtonpost.com/2012/03/31/drug-search-trekies-stopped-searched-illinois_n_1364087.html</a> ..... | 40     |
| Radley Balko, <i>The Mind of a Police Dog: How misconceptions about dogs can lead to abuse of humans</i> , REASON (Feb. 21, 2011), <a href="http://reason.com/archives/2011/02/21/the-mind-of-a-police-dog">http://reason.com/archives/2011/02/21/the-mind-of-a-police-dog</a> .....                                                                                                           | 37     |
| Radley Balko, <i>Under Asset Forfeiture Law, Wisconsin Cops Confiscate Families Bail Money</i> , THE HUFFINGTON POST (May 20, 2012), <a href="http://www.huffingtonpost.com/2012/05/20/asset-forfeiture-wisconsin-bail-confiscated_n_1522328.html">http://www.huffingtonpost.com/2012/05/20/asset-forfeiture-wisconsin-bail-confiscated_n_1522328.html</a> .....                               | 38     |
| Rena Y. Kim, Chief, FOIA/Privacy Unit, Criminal Division, Dep't of Justice, April 29, 2011 response to FOIA request, available on CD-ROM with the Institute for Justice .....                                                                                                                                                                                                                  | 25     |



## TABLE OF AUTHORITIES – Continued

|                                                                                                                                                                                                                                                                                          | Page       |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
| Richard Miniter, <i>Ill-Gotten Gains</i> , REASON, Aug. 1993, available at <a href="http://reason.com/archives/1993/08/01/ill-gotten-gains">http://reason.com/archives/1993/08/01/ill-gotten-gains</a> .....                                                                             | 21         |
| Robyn E. Blumner, <i>Police too addicted to lure of easy money</i> , ST. PETERSBURG TIMES, Aug. 17, 2003 .....                                                                                                                                                                           | 31         |
| Steven L. Kessler, CIVIL AND CRIMINAL FORFEITURE: FEDERAL AND STATE PRACTICE (2012).....                                                                                                                                                                                                 | 19         |
| U.S. Gov't Accountability Office, GAO-12-736, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED (2012), available at <a href="http://www.gao.gov/assets/600/592349.pdf">http://www.gao.gov/assets/600/592349.pdf</a> ..... | 21, 22, 24 |

## INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. A central pillar of IJ's mission is to protect the rights of individuals to own and enjoy their property, both because an individual's control over his or her property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. The ability of the government to interfere with private property without adequate safeguards gravely threatens individual liberty. For this reason, IJ both litigates cases to defend the property rights of individuals and files *amicus curiae* briefs in relevant cases, including *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012), *Alvarez v. Smith*, 558 U.S. 87 (2009), *Bennis v. Michigan*, 516 U.S. 442 (1996), and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). Additionally, IJ produces high-quality, original research on issues related to property rights, including civil forfeiture.

---

<sup>1</sup> Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. All parties in this case have consented to the filing of this *amicus* brief.

In filing this *amicus* brief in support of Respondent, IJ urges this Court to affirm the Florida Supreme Court's decision, which properly held that the government "may establish probable cause by demonstrating that the officer had a reasonable basis for believing the [narcotics-detection] dog to be reliable based on the totality of the circumstances." *Harris v. State*, 71 So. 3d 756, 758 (Fla. 2011). If this Court overturns the decision of the Florida Supreme Court, and instead adopts the rule advocated by Petitioner – that an officer's perception of a positive dog alert establishes probable cause *per se* – law enforcement officials will be able to seize and forfeit property with nothing more than an assertion that the dog alerted to illegal substances. In light of IJ's original research demonstrating the perverse financial incentives underlying civil forfeiture and the number of erroneous alerts caused by handler miscuing, this *per se* rule would severely harm the property rights of innocent owners by triggering onerous civil-forfeiture proceedings.

## SUMMARY OF ARGUMENT

*Amicus* IJ files this brief to draw attention to the consequences that this Court's ruling would have on another area of the law, civil forfeiture, in which narcotics-detection dogs are also used and the probable-cause standard also applies.

In urging reversal of the Florida Supreme Court's decision, Petitioner advocates a *per se* rule that a police officer's perception of an alert by a narcotics-detection dog establishes probable cause when the officer simply claims the dog is "trained" or "certified." Petitioner's *per se* rule conflicts with well-established Fourth Amendment precedent that the probable-cause determination is a case-specific analysis based on the totality of circumstances.

Moreover, a *per se* rule threatens the property rights of innocent owners by triggering onerous civil-forfeiture proceedings based solely on an officer's indication that a dog "alerted." Although the pending case occurs in the criminal context, any ruling as to when an alert by a narcotics-detection dog establishes probable cause to search will necessarily apply in the context of civil forfeiture because the probable-cause standard is the same in both contexts. Under the rules of civil forfeiture, law-enforcement officers may seize property if there is probable cause to believe that the property is linked to criminal activity. Thus, this Court's holding as to what evidence is necessary to establish the reliability of a narcotics-detection dog and its handler will apply not only to determine whether there is probable cause to search, arrest, or seize under criminal law, but also will determine the legality of seizures and forfeitures in the civil context, in which constitutional safeguards are more circumscribed than those afforded to criminal defendants.

Modern civil-forfeiture laws represent one of the most serious assaults on private-property rights

today. Divorced from its original justifications in seizing contraband or obtaining jurisdiction over admiralty and piracy crimes, today's civil-forfeiture laws have expanded dramatically in scope and allow law enforcement to retain most of the forfeiture proceeds. By giving law-enforcement officials a direct financial stake in generating forfeiture funds, civil forfeiture has skewed legitimate law-enforcement objectives into a profit-seeking enterprise. The explosion of civil forfeitures under federal and state law has led to the self-financing of law-enforcement agencies, creating a separation-of-powers problem and resulting in systemic abuse, including the improper use of narcotics-detection dogs to seize cash, cars, and other property, even when there is no evidence of criminal wrongdoing.

In light of this background, narcotics-detection dogs and their handlers cannot be viewed as inherently unbiased, reliable detectors of drugs, as Petitioner asserts. The profit incentive underlying civil forfeiture and the potential for handler miscuing warrant a case-by-case determination as to whether the particular narcotics-detection dog and handler are reliable and whether, under all of the circumstances, there is probable cause.

## **ARGUMENT**

Increasingly, law-enforcement officials have been using narcotics-detection dogs to establish probable

cause not only for criminal searches, but also to seize and ultimately keep cash, cars, and other property under federal and state civil-forfeiture laws. In light of this trend, this brief addresses how relying solely on a positive dog alert to establish probable cause threatens property rights of innocent owners.

Part I illustrates why a *per se* rule that an officer's perception of a positive dog alert by itself establishes probable cause conflicts with this Court's Fourth Amendment jurisprudence.

Part II details how, untethered from its original justifications, modern civil-forfeiture laws represent one of the most serious assaults on private property rights today. By allowing law enforcement to retain forfeiture proceeds, modern civil-forfeiture laws create a perverse financial incentive to seize and forfeit property. Inherently, this system of "policing for profit" leads to the self-financing of law-enforcement agencies, violating separation-of-powers principles and creating systemic abuse.

In light of this background, Part III examines how allowing police to seize and profit from property with nothing more than an officer's perception of a positive dog alert threatens the property rights of innocent owners.



**I. Adopting a *Per Se* Rule That an Officer's Perception of a Positive Alert by a "Trained" or "Certified" Narcotics-Detection Dog Establishes Probable Cause Conflicts with Well-Established Fourth Amendment Precedent.**

As a threshold matter, unless expressly limited to the criminal context, this Court's ruling would necessarily apply to civil forfeiture. Under the rules of civil forfeiture, police may seize property if there is probable cause to believe that the property is linked to criminal activity. Probable cause in the context of civil forfeiture is the same standard applied to determine the legality of arrests, searches, and seizures in criminal law. See 1 David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 11.03[4] (2012) (collecting cases); see also *United States v. \$242,484.00*, 389 F.3d 1149, 1160 (11th Cir. 2004) (*en banc*); *id.* at 1151 (noting that "the probable cause issue in this [civil forfeiture] case [was] important enough for *en banc* review because of its implications for search and seizure cases").<sup>2</sup> Indeed, much of the

---

<sup>2</sup> See also *United States v. Lot 9, Block 2 of Donnybrook Place*, 919 F.2d 994, 998 (5th Cir. 1990) ("Probable cause [] is tested by the same criteria used to determine whether probable cause exists for a valid search and seizure: whether the government has provided a reasonable ground for believing that the house was used for illegal purposes."); *United States v. Thomas*, 913 F.2d 1111, 1114 (4th Cir. 1990) ("Probable cause' for the purpose of forfeiture proceedings is the same standard used in search and seizure cases.").

jurisprudence related to narcotics-detection dogs involves forfeiture of cash, vehicles, or other property.<sup>3</sup> In some states<sup>4</sup> and even under some federal statutes,<sup>5</sup> a showing of probable cause alone will support forfeiture.

Correctly applying this Court's precedent, the Florida Supreme Court held that the government may fulfill its burden to establish probable cause for a warrantless search "by demonstrating that the officer had a reasonable basis for believing the [narcotics-detection] dog to be reliable based on the totality of circumstances." *Harris v. State*, 71 So. 3d 756, 758 (Fla. 2011). Accordingly, it held that in determining whether there is probable cause, a trial court must consider the following circumstances: training and certification records along with an explanation of those records; field-performance records; the experience and training of the dog's handling officer; and "any other objective evidence known to the officer

---

<sup>3</sup> See, e.g., 1 David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 4.03[3][b] (2012) (describing forfeiture cases premised on a narcotics-detection dog's "alert" to currency).

<sup>4</sup> See Marian R. Williams, Ph.D., Jefferson E. Holcomb, Ph.D., Tomislav V. Kovandzic, Ph.D. & Scott Bullock, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 22 (2010) (depicting in Table 2 the standard of proof required under state forfeiture laws), available at [http://www.ij.org/images/pdf\\_folder/other\\_pubs/assetforfeituretoemail.pdf](http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf) [hereinafter POLICING FOR PROFIT].

<sup>5</sup> Most forfeiture statutes under Title 19 of the U.S. Code allow forfeiture of property based solely on a showing of probable cause.

about the dog's reliability in being able to detect the presence of illegal substances." *Id.* at 759.

In urging reversal of the Florida Supreme Court's decision, Petitioner advocates a *per se* rule that a police officer's perception of an alert by a narcotics-detection dog establishes probable cause when the officer claims the dog is "trained" or "certified" – notwithstanding the facts that it is the government's duty to demonstrate probable cause and that there is no meaningful way to assess a claim of "training" or "certification" without underlying records because there is no standardized state program for training or certification. Petitioner's *per se* rule conflicts with well-established Fourth Amendment precedent establishing a totality-of-the-circumstances approach.

On numerous occasions, this Court has offered guidance on the meaning of probable cause.<sup>6</sup> In a

---

<sup>6</sup> See, e.g., *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (describing probable cause as "a practical, common-sense decision whether, given all the circumstances . . . including the 'veracity' and 'basis of knowledge' of [any] hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place"); *United States v. Cortez*, 449 U.S. 411, 418 (1981) (observing that probable cause "does not deal with hard certainties, but with probabilities"); *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (characterizing probable cause as "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act"); *Carroll v. United States*, 267 U.S. 132, 149 (1925) (defining probable cause as "a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and

(Continued on following page)

unanimous decision, this Court observed that “the substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized with respect to the person to be searched or seized.” *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (internal citations and quotation marks omitted). This Court has recognized that this “long-prevailing standard of probable cause protects ‘citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,’ while giving ‘fair leeway for enforcing the law in the community’s protection.’” *Id.* at 370 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

Repeatedly, this Court has eschewed rigid, bright-line rules for assessing probable cause. In adopting a totality-of-the-circumstances approach for determining whether an informant’s tip provided probable cause, this Court emphasized that:

[P]robable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules. Informants’ tips doubtless come in many shapes and sizes from many different types of persons. . . . Rigid legal rules are ill-suited

---

destruction”); *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813) (Marshall, C.J.) (“[T]he term ‘probable cause,’ according to its usual acceptation, means less evidence which would justify condemnation”).

to an area of such diversity. One simple rule will not cover every situation.

*Illinois v. Gates*, 462 U.S. 213, 232 (1983) (internal citations and quotation marks omitted). Additionally, this Court has recognized the importance of corroborating information obtained from others “by independent police work.” *Id.* at 241.

Contravening centuries of jurisprudence, Petitioner and its *amici* urge this Court to adopt a *per se* rule that a positive alert by a “trained” or “certified” narcotics-detection dog, standing alone, is sufficient to establish probable cause, irrespective of what “trained” or “certified” actually means. *See, e.g.*, Pet’r’s Br. 16, 19-20. Aside from raising the specter of mini-trials, Petitioner offers no justification for jettisoning the well-established “totality-of-the-circumstances” framework. To the contrary, just like informants’ tips, dog alerts “come in many shapes and sizes,” from many different kinds of dogs, and interpreted by many different kinds of handlers – rendering such a rigid legal rule ill-suited. Furthermore, the fact that training programs and certification programs vary greatly warrants a case-by-case approach. *See Harris*, 71 So. 3d at 767 (“[T]here is no uniform standard in [Florida] or nationwide for an acceptable level of training, testing, or certification for drug-detection dogs.”). “In the absence of a uniform standard, the reliability of the dog cannot be established by demonstrating only that a canine is trained and certified.” *Id.* at 768; *see also* Resp’t’s Br. 45-46.



Moreover, in cases in which the dog alerted to residual odor rather than any actual drugs present, allowing a positive alert to establish probable cause would conflict with the requirement that the probable cause be particularized. See *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (“Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person.”). Precisely because a dog’s keen sense of smell allows it to detect residual odors “at extraordinarily low concentrations,” Pet’r’s Br. 16, the requirement of particularity is not met because it is not reasonable to believe that the residual odor is tied to the particular person, or in the case of civil forfeiture, to believe that the particular car, cash, or other property had a substantial connection to the residual odor of drugs.

Contrary to Petitioner’s suggestion, see Pet’r’s Br. 19-20, this Court has never recognized that an alert by a narcotics-detection dog, standing alone, establishes probable cause. Petitioner’s reliance on *dicta* by a plurality of this Court in a case involving the “discrete category of airport encounters” is misguided. See *Florida v. Royer*, 460 U.S. 491, 505-06 (1983) (opining that a positive alert by a “trained dog[] to detect the presence of controlled substances in luggage” in an international airport “would have resulted in [the defendant’s] justifiable arrest on probable cause”) (plurality opinion). The plurality was not suggesting that the dog alert, by itself, constituted probable cause. Read in context, the plurality was



suggesting that probable cause would be supported by the hypothetical dog alert along with all the other previously known facts giving rise to reasonable suspicion – *i.e.*, a “nervous young man with two American Tourister bags paid cash for an airline ticket to a ‘target city’ . . . under an assumed name” and proffered an explanation that did not satisfy the officers. *Id.* at 507.

Indeed, in a case cited by Petitioner, the Eleventh Circuit provides a good model of how the totality-of-circumstances framework should be applied to determine probable cause in the context of a civil-forfeiture action involving a trained narcotics-detection dog. In *United States v. \$242,484.00*, 389 F.3d 1149 (11th Cir. 2004) (*en banc*), the federal government sought civil forfeiture of cash seized from an airplane passenger by the Drug Enforcement Agency (“DEA”). In affirming the district court’s finding that, under the totality of the circumstances, there was probable cause to believe that the cash was traceable to illegal drug transactions, the appeals court relied on all of the following facts:

- The sheer quantity of cash – nearly a quarter of a million dollars in small bills, weighing 40 pounds – suggested an illegitimate enterprise because other means of transporting the money (wiring, obtaining a cashier’s check, or simply exchanging the cash into larger denominations, thereby reducing the weight to merely five pounds) would have generated a currency-transaction report;

- The cash was bundled in rubber bands, wrapped in cellophane and Christmas wrapping paper, and stuffed into a backpack, consistent with methods drug couriers routinely use to conceal currency;
- The passenger's route from Miami to New York was a common drug-courier route, and the passenger had changed her return date twice in two days;
- Although the passenger claimed she picked up the money on behalf of her brother for his import/export business, she was unable to identify the people who gave her the money, where she met them, where she stayed in New York during her four-day trip, and gave conflicting reasons for her travel;
- No one – not the people who gave the passenger the money, her brother, or the import/export business she claimed the money belonged to – ever stepped forward to claim the money in the two years and nine months the case was pending;
- The DEA database flagged the name of the import/export business for “possible money laundering”; and
- Rambo, a trained narcotics-detection dog, alerted to the passenger's bag.

Thus, independent police work corroborated Rambo's positive alert. In contrast, the rule urged by Petitioner would have allowed the government to seize nearly a quarter of a million dollars based on nothing more than the last fact, even though there was conflicting testimony regarding how Rambo alerted. Far from being unworkable, the traditional totality-of-the-circumstances approach better protects innocent owner's property rights while serving legitimate law-enforcement objectives.

In addition to independent police work, the totality of the circumstances necessarily includes the narcotics-detection team's performance in the field. Federal and state courts have considered field performance as an important factor in assessing whether a positive alert by a narcotics-detection dog established probable cause.<sup>7</sup> Petitioner's approach, however, would preclude courts from even considering how the particular narcotics-detection team actually performed in the field, providing incentives for the government to not maintain field-performance records. See Resp't's Br. 36-42.

---

<sup>7</sup> See, e.g., *United States v. Limares*, 269 F.3d 794, 797-98 (7th Cir. 2001); *United States v. Diaz*, 25 F.3d 392, 395-96 (6th Cir. 1994); *United States v. Ligenfelter*, 997 F.2d 632, 639 (9th Cir. 1993); *United States v. Outlaw*, 134 F. Supp. 2d 807, 810-12 (W.D. Tex. 2001); *State of Tennessee v. England*, 19 S.W.3d 762, 768-69 (Tenn. 2000); *State of Kansas v. Barker*, 850 P.2d 885, 891-93 (Kan. 1993).

In addition to conflicting with centuries of jurisprudence by this Court, a *per se* rule that an officer's perception of a dog alert, by itself, establishes probable cause would also trigger onerous civil-forfeiture proceedings, thereby harming the property rights of innocent owners. But before addressing this harm, it is first necessary to examine modern civil-forfeiture laws and how they operate to give law enforcement a direct financial incentive to seize property.

## **II. Civil-Forfeiture Laws Constitute One of the Most Serious Assaults on Private-Property Rights Today.**

"[T]he most basic function of any government [is] to provide for the security of the individual and of his property." *Gates*, 462 U.S. at 237 (quotation marks and citation omitted). A free society must guarantee the security of both the individual and his property because an individual secure in his person, but not in his property, is not truly free. As this Court has recognized, "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993); see also *id.* at 81 (Thomas, J., concurring in part and dissenting in part) (stating that property rights "are central to our heritage"). Consequently, private property is one of our nation's most cherished principles, as reflected in our Constitution. See, e.g., *United States v. Jones*, 132 S. Ct. 945, 949 (2012) ("The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred

simply to the 'right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous.").

Yet, through modern civil-forfeiture laws, government at all levels has contributed to endangering the security of the individual and his property. Under federal and state civil-forfeiture laws, law-enforcement officials can seize and keep property suspected of involvement in criminal activity. Unlike criminal forfeiture, under civil forfeiture, property owners need not be found guilty of a crime – or even charged of any wrongdoing – to permanently lose their cash, car, home, or other property. And because they are civil proceedings, most of the constitutional protections afforded to criminal defendants do not apply to property owners in civil-forfeiture cases.

Perhaps the most troubling aspect of modern civil-forfeiture laws is the profit incentive at their core. The overriding goal for both prosecutors and police should be the fair and impartial administration of justice. However, by allowing law enforcement to retain forfeiture proceeds, civil-forfeiture laws dangerously shift law-enforcement priorities toward the pursuit of property and profit. By distorting law-enforcement priorities and creating agencies funded from outside the legislative process, federal and state forfeiture systems have eviscerated accountability and led to systemic abuse.

**A. Civil forfeiture has expanded dramatically and become unmoored from its original justifications as envisioned by the founding generation.**

Although civil-forfeiture laws have been on the books since the nation's founding, in stark contrast to modern civil-forfeiture laws, these early laws were limited in scope and justification. For example, early laws authorizing forfeiture were based on the unquestioned ability of the government to seize contraband, in which no property rights were vested. Contraband included not only *per se* illegal goods and stolen goods, but also goods that were concealed to avoid paying required customs duties, which at the time provided 80 to 90 percent of the finances for the federal government.<sup>8</sup> See Act of July 31, 1789, 1 Stat. 29, 43 (providing that all "goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited"). Additionally, forfeiture of noncontraband items was justified only by the practical necessities of enforcing admiralty or piracy laws. As an *in rem* proceeding, an action against the property itself, forfeiture allowed courts to obtain jurisdiction over property when it was virtually impossible to seek justice against property owners guilty of admiralty

---

<sup>8</sup> James R. Maxeiner, *Bane of American Forfeiture Law: Banished at Last?* 62 CORNELL L. REV. 768, 782 n. 86 (1977).



or piracy violations because they were overseas or otherwise outside the court's jurisdiction.<sup>9</sup>

Although this Court permitted the government to expand its forfeiture power during the Civil War,<sup>10</sup> civil forfeiture remained a relative backwater in American law throughout most of the 20th century. During the Prohibition Era, the federal government expanded the scope of its forfeiture authority beyond *per se* contraband to cover automobiles or other vehicles transporting illegal liquor. However, the forfeiture provision of the National Prohibition Act was considered "incidental" to the primary purpose of "destroy[ing] the forbidden liquor in transportation." *Carroll v. United States*, 267 U.S. 132, 155 (1925).

In stark contrast, modern civil-forfeiture laws, which trace their origins to the government's war on drugs, differ from their predecessors in three key respects. First, modern civil-forfeiture laws are much broader in scope, covering not only illegal drugs and any conveyance used to transport them, but all manner of real and personal property connected to the

---

<sup>9</sup> See, e.g., *The Brig Malek Adhel*, 43 U.S. 210, 233 (1844) (justifying forfeiture of innocent owner's vessel under piracy and admiralty laws because of "the necessity of the case, as the only adequate means of suppressing the offence or wrong") (emphasis added); *The Palmyra*, 25 U.S. 1, 14 (1827) (revenue laws); *United States v. The Schooner Little Charles*, 1 Brock. 347, 354 (C.C.D.Va. 1819) (Marshall, C.J.) (embargo laws).

<sup>10</sup> Leonard W. Levy, *A LICENSE TO STEAL. THE FORFEITURE OF PROPERTY* 51-57 (1996).

alleged criminal activity.<sup>11</sup> Moreover, Congress and state legislatures have expanded forfeiture beyond alleged instances of drug violations to include myriad crimes at the federal and state levels. Today there are more than 400 federal forfeiture statutes relating to a number of federal crimes, from environmental crimes to the failure to report currency transactions.<sup>12</sup> Further, all states have statutory provisions for some form of civil forfeiture.<sup>13</sup>

Second, in contrast to most of American history in which the proceeds from civil forfeitures went to a general fund to benefit the public at large, modern civil-forfeiture laws allow law-enforcement officials to keep most of the forfeiture proceeds. In 1984, Congress amended parts of the Comprehensive Drug Abuse and Prevention Act of 1970 to allow federal law-enforcement agencies to keep a portion of the forfeiture proceeds in a newly created Assets Forfeiture Fund.<sup>14</sup> Initially, any forfeiture proceeds exceeding

---

<sup>11</sup> See, e.g., 21 U.S.C. § 881(a)(7) (subjecting to forfeiture all real property “used, or intended to be used, in any manner or part, to commit, or facilitate the commission of” a drug crime).

<sup>12</sup> See Asset Forfeiture and Money Laundering Section, U.S. Dep’t of Justice Criminal Div., *SELECTED FEDERAL ASSET FORFEITURE STATUTES* (2006), available at <http://www.justice.gov/criminal/foia/docs/afstats06.pdf>.

<sup>13</sup> See generally Steven L. Kessler, *CIVIL AND CRIMINAL FORFEITURE: FEDERAL AND STATE PRACTICE* (2012) (discussing each state’s civil-forfeiture provisions).

<sup>14</sup> Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

\$5 million that remained in the Assets Forfeiture Fund at the end of the fiscal year were to be deposited in the Treasury's general fund.<sup>15</sup> Moreover, the government's use of proceeds in the Assets Forfeiture Fund was restricted to a relatively limited number of purposes, such as paying for forfeiture expenses like storing the property or giving awards for information that led to forfeitures.<sup>16</sup> However, subsequent amendments eliminated both the \$5-million cap and dramatically broadened the scope of expenses the government could pay for with the Assets Forfeiture Fund, including purchasing vehicles and paying overtime salaries.<sup>17</sup> In short, after the 1984 amendments, federal agencies were able to retain and spend forfeiture proceeds – subject only to very loose restrictions – giving them a direct financial stake in generating forfeiture funds.<sup>18</sup> Many states followed the federal government's example by amending their civil-forfeiture laws to give law-enforcement agencies a direct share of forfeited proceeds. Law-enforcement

---

<sup>15</sup> *Id.* § 310, 98 Stat. at 2053 (previously codified at 28 U.S.C. § 524(c)(7)).

<sup>16</sup> *Id.* § 310, 98 Stat. at 2052 (previously codified at 28 U.S.C. § 524(c)(1)).

<sup>17</sup> 28 U.S.C. § 524(c)(1)(F)(i), (c)(1)(I).

<sup>18</sup> Although Congress enacted the Civil Asset Forfeiture Reform Act in 2000, none of those reforms changed how forfeiture proceeds are distributed or otherwise mitigated the direct pecuniary interest law-enforcement agencies have in civil forfeitures. See Pub. L. No. 106-185, 114 Stat. 202 (2000).

agencies in 42 states receive some or all of the civil-forfeiture proceeds they seize.<sup>19</sup>

Third, by allowing law-enforcement officials to retain forfeiture proceeds, federal and state forfeiture laws create a perverse financial incentive to maximize the seizure of forfeitable property. Consequently, unlike their predecessors, under modern civil-forfeiture laws, forfeiture of property is often the primary purpose of the seizure. As the former chief of the federal government's Asset Forfeiture and Money Laundering Offices observed, "We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws."<sup>20</sup> Indeed, according to a July 2012 report by the United States Government Accountability Office ("GAO"), one of the three primary goals of the Assets Forfeiture Fund is "to produce revenues in support of future law enforcement investigations and related forfeiture activities."<sup>21</sup>

---

<sup>19</sup> POLICING FOR PROFIT at 17 (2010) (depicting in Table 1 the percentage of forfeiture proceeds distributed to law enforcement in each state).

<sup>20</sup> Richard Miniter, *Ill-Gotten Gains*, REASON, Aug. 1993, at 32, 34 (quoting Michael F. Zeldin, former director of the Justice Department's Asset Forfeiture & Money Laundering Office), available at <http://reason.com/archives/1993/08/01/ill-gotten-gains>.

<sup>21</sup> U.S. Gov't Accountability Office, GAO-12-736, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED 6

(Continued on following page)

In sum, no longer is civil forfeiture tied to seizing contraband or the practical difficulties of obtaining personal jurisdiction over an individual. Unmoored from its historical limitation as a necessary means of enforcing admiralty and piracy laws, the forfeiture power has not only grown into a commonly used weapon in the government's crime-fighting arsenal, but morphed into a profit-seeking venture for the government.

**B. The ability of law enforcement to retain civil-forfeiture proceeds inexorably has led to "policing for profit."**

As a direct result of federal and state law incentivizing law-enforcement officials to seize property under civil forfeiture, there has been an explosion of forfeiture revenue. First, federal forfeitures have grown exponentially. Second, state law-enforcement agencies have been getting more and more money through the federal equitable-sharing program, which pays state agencies with up to 80 percent of the forfeiture proceeds for referring civil forfeitures to federal authorities. Finally, not only do state agencies directly benefit from forfeitures under equitable sharing, but forfeitures conducted under their own state laws also are on the rise.

---

(2012), available at <http://www.gao.gov/assets/600/592349.pdf> [hereinafter *GAO-12-736 Report*].



The U.S. Department of Justice's Assets Forfeiture Fund, the largest of the federal government's forfeiture funds, illustrates how federal forfeitures have grown exponentially. In 1986, the second year after it was created, the fund took in \$93.7 million in proceeds from forfeited assets. By 2008, the fund for the first time in history topped \$1 billion in net assets, *i.e.*, forfeiture proceeds free and clear of debt obligations and now available for use by law enforcement. And from fiscal years 2003 to 2011, the fund's revenues more than tripled, growing from \$500 million in FY 2003 to \$1.8 billion in FY 2011.<sup>22</sup>

Second, payments under the federal equitable-sharing program have also grown dramatically. Under this program, state and local law enforcement share in the proceeds of federal civil-forfeiture actions they refer to federal authorities, and can use those proceeds as they see fit to support state law-enforcement activities.<sup>23</sup> According to the GAO, in the last nine years, equitable-sharing payments to state and local law-enforcement agencies have more than doubled, growing from \$218 million in FY 2003 to

---

<sup>22</sup> *Id.* at 11.

<sup>23</sup> See generally Dick M. Carpenter II, Ph.D., Larry Salzman & Lisa Knepper, *INEQUITABLE JUSTICE: HOW "EQUITABLE SHARING" ENCOURAGES LOCAL POLICE AND PROSECUTORS TO EVADE STATE CIVIL FORFEITURE LAW FOR FINANCIAL GAIN* (2011), *available at* [http://www.ij.org/images/pdf\\_folder/private\\_property/forfeiture/inequitable\\_justice-mass-forfeiture.pdf](http://www.ij.org/images/pdf_folder/private_property/forfeiture/inequitable_justice-mass-forfeiture.pdf) (analyzing federal equitable-sharing program) [hereinafter *INEQUITABLE JUSTICE*].



\$445 million in FY 2011.<sup>24</sup> Notably, except for 2007, equitable-sharing payments outpaced payments to compensate victims.<sup>25</sup> Indeed, the GAO noted that when compared with Justice Department grant programs, equitable sharing is one of the largest “programs providing funds to state and local law-enforcement activities.”<sup>26</sup> According to state and local law-enforcement officials interviewed by the GAO:

the equitable sharing program is extremely important because it helps fund equipment, training and other programs that they may otherwise not be able to afford. For example, one local law enforcement agency stated that salaries make up 96 percent of its annual budget. As a result, equitable sharing dollars allow them to purchase equipment they could not otherwise buy with the limited available annual budget.<sup>27</sup>

In fiscal year 2011, Florida was the third-largest recipient of equitable-sharing payments, receiving more than \$38 million (surpassed by New York which received almost \$48.5 million and California which received more than \$79 million).<sup>28</sup>

---

<sup>24</sup> GAO-12-736 Report at 15.

<sup>25</sup> *Id.* at 15 tbl. 1.

<sup>26</sup> *Id.* at 15.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 44 app. I fig. 7.

As significant as these statistics are, they underestimate the extent of the equitable-sharing program because the Department of Justice's Assets Forfeiture Fund is not the only source for equitable-sharing funding.<sup>29</sup> State and local agencies can also secure equitable-sharing revenue from other federal agencies like the Department of Treasury. Through public-records requests, *amicus* IJ was able to obtain records for annual equitable-sharing reports at the agency level for nine sample states, including Florida. These records show not only that equitable sharing is on the rise, but that the revenue generated is much more than what the Assets Forfeiture Fund reveals. For example, in 2010, Florida agencies received \$23,878,690 in equitable-sharing payments from the Justice Department's Assets Forfeiture Fund, but an additional \$17,861,089 from all other sources.<sup>30</sup>

Worse, under equitable-sharing programs, federal authorities can "adopt" state forfeitures involving a violation of federal law and thereby apply relatively lax federal standards instead of the applicable state standards.<sup>31</sup> Thus, when state laws protect property rights by making civil forfeiture more difficult or restricting forfeiture proceeds from being funneled back to seizing authorities, equitable sharing creates

---

<sup>29</sup> *INEQUITABLE JUSTICE* at 10.

<sup>30</sup> Information received on April 29, 2011 from Rena Y. Kim, Chief, Freedom of Information Act/Privacy Unit, Criminal Division, Dep't of Justice, available on CD-ROM from IJ.

<sup>31</sup> *INEQUITABLE JUSTICE* at 5.

a loophole that frustrates more-stringent state standards. For example, Nebraska's Constitution requires that half of forfeited funds go to public schools.<sup>32</sup> To circumvent this requirement, law-enforcement agencies ask federal prosecutors to "adopt" their seizures under the federal equitable-sharing program. Under this program, the agency keeps 80 percent of the proceeds, the federal government retains 20 percent, and the Nebraska public schools get nothing. When a state senator introduced an amendment to require that those funds also be shared with schools, both state and federal law-enforcement officials fought against it.<sup>33</sup>

A study published last year confirms such anecdotal reports that equitable sharing encourages local law enforcement to evade stricter state forfeiture laws.<sup>34</sup> The study first categorized the civil-forfeiture laws of all 50 states according to the following three dimensions: (1) profit motive, or how forfeiture proceeds are distributed; (2) the burden placed on the innocent owner to claim the property; and (3) the standard of proof that the government bears to

---

<sup>32</sup> NEB. CONST. art. VII, § 5.

<sup>33</sup> Patrick Strawbridge, *Police Oppose Drug-Cash Plan*, THE OMAHA WORLD-HERALD, May 1, 1999, at 57.

<sup>34</sup> Jefferson E. Holcomb, Ph.D., Tomislav V. Kovandzic, Ph.D. & Marian R. Williams, Ph.D., *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. OF CRIM. JUSTICE 273 (2011) [hereinafter *Civil Asset Forfeiture*].

demonstrate that the property is forfeitable.<sup>35</sup> The study then examined how these three dimensions of state civil-forfeiture laws correlate with equitable-sharing payments to local law-enforcement agencies.<sup>36</sup> The study concluded that all three aspects of state civil-forfeiture law independently, and in concert, impact the size of equitable-sharing payments.<sup>37</sup> Specifically, states with tougher forfeiture laws – laws that either decrease the profit motive, place the burden to show guilt on the government, or require higher standards of proof for forfeiture – receive more equitable-sharing payments.<sup>38</sup> Thus, state laws making forfeiture more difficult and less rewarding lead to greater use of the federal equitable-sharing loophole. *Amicus* IJ graded and ranked states according to their state forfeiture laws and how much they evaded their state laws through federal equitable sharing.<sup>39</sup> Florida was one of the ten worst states, having both bad state laws and considerable participation in equitable sharing, earning an overall “D” grade.<sup>40</sup>

---

<sup>35</sup> *Id.* at 276-78; see also *INEQUITABLE JUSTICE* at 4-5 (depicting states’ forfeiture laws in Tables 1 through 3).

<sup>36</sup> *Civil Asset Forfeiture* at 279-82.

<sup>37</sup> *Id.* at 282-83.

<sup>38</sup> *Id.* at 283.

<sup>39</sup> *POLICING FOR PROFIT* at 53; *INEQUITABLE JUSTICE* at 9 (depicting in Table 6 each state’s forfeiture law grades, evasion grades, and final grades).

<sup>40</sup> *POLICING FOR PROFIT* at 53.

Finally, although data on civil forfeitures under state law are sparse, the data IJ has obtained from state reporting requirements and federal sources demonstrates that forfeitures under state law have also grown dramatically. For example, in Florida, law-enforcement officials receive 85 percent of the funds generated from civil forfeitures under state law.<sup>41</sup> As detailed above, this strong profit incentive would lead one to predict that law-enforcement agencies in Florida will make substantial use of civil forfeiture at the state level, just as it does through equitable sharing. And this prediction is borne out by empirical evidence: In a mere three-year period from 2001 to 2003, Florida raked in more than \$100 million in forfeitures under state law and anywhere from \$16 million to \$48 million per year in the 2000s through equitable sharing.<sup>42</sup>

**C. The meteoric rise in forfeitures has skewed legitimate law-enforcement priorities, creating self-financing agencies and systemic abuse.**

The exponential growth of federal and state forfeitures has led to self-financing law-enforcement

---

<sup>41</sup> POLICING FOR PROFIT at 53. In the majority of states, law-enforcement agencies keep 100 percent of forfeiture proceeds. *Id.* at 17.

<sup>42</sup> *Id.* at 53. These figures may overlap, as it is not clear whether Florida included equitable-sharing revenue in its response to freedom-of-information requests.

agencies that are no longer dependent on legislative appropriations and to systemic abuse. According to a survey of nearly 800 law-enforcement executives, nearly 40 percent reported that civil-forfeiture proceeds were a necessary supplement to their agency's budget.<sup>43</sup> At the federal level, the Department of Justice has urged its lawyers to increase their civil-forfeiture efforts so as to meet the Department's annual budget targets.<sup>44</sup>

The ability of law-enforcement agencies to self-finance contradicts the principle of separation of powers. As George Mason cautioned, "When the same man, or set of men, holds both the sword and the purse, there is an end of liberty."<sup>45</sup> Or, as a recent report observed:

The dependency of police on public resources for their operations is an important check on police power. Self-generating revenues by the police through forfeiture potentially threatens the ability of popularly elected officials to constrain police activities.<sup>46</sup>

---

<sup>43</sup> John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 179 (2001).

<sup>44</sup> Exec. Office for U.S. Attorneys, U.S. Dep't of Justice, 38 United States Attorneys' Bulletin 180 (1990).

<sup>45</sup> George Mason, *Fairfax County Freeholders' Address and Instructions to Their General Assembly Delegates* (May 30, 1783), in Jeff Broadwater, *GEORGE MASON: FORGOTTEN FOUNDER* 153 (2006).

<sup>46</sup> *Civil Asset Forfeiture* at 283.



The result, is that, increasingly, forfeiture funds “become[] off-the-books slush funds through which law enforcement agencies can self-finance, exempted from democratic controls.”<sup>47</sup>

In some states law-enforcement agencies have flouted state reporting requirements intended to serve as a minimal check on forfeiture abuse.<sup>48</sup> And the potential for serious abuse is not just theoretical. Law enforcement’s reluctance to give up forfeiture proceeds has led to illegality.<sup>49</sup> In November 2000, citizens of Utah passed an initiative requiring forfeiture proceeds to be deposited into the state’s Uniform School Trust Fund.<sup>50</sup> Ignoring this law, prosecutors in three counties diverted nearly a quarter of a million dollars into their own accounts. Only under the threat of a lawsuit did the prosecutors capitulate. Subsequently, police and prosecutors persuaded the legislature to nullify the voter-approved initiative, so

---

<sup>47</sup> Erin Norman & Anthony Sanders, *FORFEITING ACCOUNTABILITY: GEORGIA LAW ENFORCEMENT’S HIDDEN CIVIL FORFEITURE FUNDS* 1 (2011), available at <http://www.ij.org/forfeiting-accountability-2>.

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., 1 David B. Smith, *PROSECUTION AND DEFENSE OF FORFEITURE CASES* ¶ 7.02[2] (2012) (discussing conspiracy between Missouri law enforcement and Drug Enforcement Agency to thwart state law requiring judicial approval before federal government may adopt a state forfeiture case).

<sup>50</sup> Patty Henetz, *Prosecutors, Police Reluctantly Comply With Asset Seizure Law*, *THE ASSOCIATED PRESS STATE & LOCAL WIRE*, July 17, 2003.

that all forfeiture proceeds were again directed to law enforcement.<sup>51</sup>

The lack of oversight has even led to the personal use of seized property. In 2003, top Tampa Bay police officers used seized cars for their own personal use.<sup>52</sup> The seized fleet consisted of some 42 cars, including a Lincoln Navigator, a Ford Expedition, and, Police Chief Bennie Holder's favorite, a \$38,000 Chevy Tahoe. Forfeiture has also been abused to make highly questionable purchases:

- In Austin, Texas, running gear for the police department;
- In Fulton County, Georgia, football tickets for the district attorney's office;
- In Webb County, Texas, \$20,000 for TV commercials for the district attorney's re-election campaign;
- In Albany, New York, over \$16,000 for food, gifts and entertainment for the police department; and
- In Colorado, bomber jackets for State Patrol officers.<sup>53</sup>

Examples of forfeiture abuse include the use of narcotics-detection dogs. For example, in June 2012,

---

<sup>51</sup> *Id.*

<sup>52</sup> Robyn E. Blumner, *Police too addicted to lure of easy money*, ST. PETERSBURG TIMES, Aug. 17, 2003, at D7.

<sup>53</sup> POLICING FOR PROFIT at 18.

a group of troopers filed a lawsuit against the Nevada Highway Patrol and Las Vegas Metro Police alleging that the Patrol Commander conspired to use narcotics-detection dogs to systematically conduct illegal searches and seizures for financial benefit.<sup>54</sup> The complaint alleges that the narcotics-detection dogs were intentionally trained to respond to cues from their handlers and provide false alerts that they had detected drugs in the hopes of seizing property for forfeiture (which, incidentally, funded the entire dog program).<sup>55</sup>

Far from being cherry-picked examples of a few “bad apples” in law enforcement, these cases show that the potential for abuse is systemic because incentives matter. Just as private citizens are motivated by self-interest, so too are government officials.<sup>56</sup> Government officials attempt to maximize the size and budget of their agency, which will benefit everyone within the agency through higher salaries, greater job security, better equipment, and increased power and prestige. These incentives affect even the most well-intentioned law-enforcement officers.

---

<sup>54</sup> Nicole Benson, *NHP Troopers Sue Department Over K-9 Program*, KLAS-TV, Jun. 26, 2012, available at <http://www.8newsnow.com/story/18886948/2012/06/26/nhp-troopers-sue-department-over-k-9-program>.

<sup>55</sup> See also Levy, *supra* note 11, at 2-7 (collecting examples).

<sup>56</sup> James Buchanan & Gordon Tullock, *THE CALCULUS OF CONSENT* (1962) (discussing the universality of the self-interest axiom and its implications for public policy decision-making).

Because, in contrast to private citizens, government officials can use force to achieve their ends, it is a constant threat that those in positions of power will use that force to serve their own self-interest at the expense of the larger public. This concern reaches its zenith when government officials stand to benefit themselves by seizing private property.

By allowing law-enforcement agencies to retain proceeds, modern civil-forfeiture laws create perverse incentives to seize property first and ask questions later. Creating a self-financing system has led to systematic abuse, including using narcotics-detection dogs to seize and ultimately forfeit property.

### **III. Permitting a Finding of Probable Cause Based Solely on an Officer's Perception of a Positive Dog Alert Would Exacerbate Forfeiture Abuse, Threatening the Property Rights of Innocent Owners.**

In light of how civil forfeiture creates perverse incentives to seize property first and ask questions later, overturning the Florida Supreme Court's decision and adopting a *per se* rule that a positive alert by a narcotics-detection dog establishes probable cause would severely undermine the property rights of innocent owners by dramatically expanding the ability of law enforcement to seize and forfeit property.

Petitioner's characterization of a narcotics-detection dog and its partner as a reliable, unbiased "divining rod" for drugs is unfounded. Moreover, if a

positive dog alert, by itself, provides probable cause to seize property, innocent owners will become ensnared in expensive and onerous proceedings in which they bear the burden of proving their innocence. A fluid approach to determining probable cause in the canine context, in line with this Court's precedent, would provide greater protection to innocent property owners and better serve legitimate law-enforcement objectives.

**A. Narcotics-detection dogs and their handlers are not inherently unbiased, reliable "divining rods" for drugs.**

Contrary to Petitioner's portrayal of narcotics-detection teams as unbiased,<sup>57</sup> the strong profit incentive underlying civil forfeiture detailed *supra* in Section II necessarily means that the police and their canine companions may be motivated by something other than legitimate law-enforcement objectives. Petitioner questions why law enforcement would want "to rely on a dog that serially fails to detect contraband." Pet'r's Br. 23. However, if a positive dog alert by itself provides probable cause to seize and forfeit property, it would not matter whether any contraband was actually found in terms of civil forfeiture, especially when police rely on a "residual odor"

---

<sup>57</sup> See Pet'r's Br. 23 ("Law enforcement interests, in other words, are naturally aligned with the interests of ensuring reliability.").

theory to provide probable cause that the item subject to forfeiture is linked to crime.

This Court has recognized that, even in the criminal context in which there is no underlying profit motive, law enforcement is not a completely unbiased venture, and therefore requires the protection of a neutral judicial officer:

The essential protection of the warrant requirement of the Fourth Amendment . . . is in requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the *often competitive enterprise of ferreting out crime*.

*Gates*, 462 U.S. at 240 (quotations and citations omitted, alteration in original) (emphasis added). This observation is all the more true when police, who stand to financially benefit from the seizure through civil forfeiture, are the ones to make the probable-cause determination in the first instance, rather than a neutral, detached judicial officer.

In arguing that narcotics-detection dogs lack “ulterior objectives,” Petitioner compares them to honest citizen informants. Pet’r’s Br. 28 (citing *Gates*, 463 U.S. at 233). But this false parallel does not weigh in favor of the rule urged by Petitioner. This Court has never held that information provided by an honest citizen, by itself, establishes probable cause. Rather, this Court merely recognized that information from an honest citizen would not require



“rigorous scrutiny” because of the availability of criminal liability if the citizen had lied. *Gates*, 462 U.S. at 233-34 (“[I]f an unquestionably honest citizen comes forward with a report of criminal activity – which if fabricated would subject him to criminal liability – we have found rigorous scrutiny of the basis of his knowledge unnecessary.”). Obviously, no such criminal liability attaches to the dog.

Moreover, numerous studies show there is a significant risk that the dog is alerting due to cues from the handler or residual odors, rather than the actual presence of drugs.<sup>58</sup> A University of California-Davis study led by neurologist and former dog handler Lisa Lit asked 18 professional dog handlers and their canine companions to complete two sets of four searches.<sup>59</sup> Some of the search areas contained decoy scents but none actually contained drugs; thus, any “alert” made by the dog had to be false. Before the searches, handlers were misinformed that some of the search areas might contain up to three target scents and that some targets would be marked by a piece of red paper. The findings showed that of the 144 searches, only 21 accurately produced no alerts.

---

<sup>58</sup> See generally Br. of Amicus Curiae Nat’l Ass’n of Criminal Def. Lawyers, The Florida Ass’n of Criminal Def. Lawyers and the American Civil Liberties Union in Supp. of Resp’t at 8-26 (discussing scientific studies of narcotics-detection dogs).

<sup>59</sup> Lisa Lit *et al.*, *Handler beliefs affect scent detection dog outcomes*, 14 ANIMAL COGNITION 387 (2011); see also *Clever Hounds*, THE ECONOMIST (Feb. 15, 2011), [http://www.economist.com/blogs/babbage/2011/02/animal\\_behaviour](http://www.economist.com/blogs/babbage/2011/02/animal_behaviour).

When handlers could see a red piece of paper, purportedly marking a target scent, their dogs were much more likely to have falsely alerted – alerting to 32 of a possible 36 alerts. Thus, an alert by a narcotics-detection dog may have more to do with the handler’s expectations and desires than whether drugs are actually present.<sup>60</sup>

**B. Triggering civil-forfeiture proceedings based on nothing more than a positive dog alert would threaten innocent owners’ property.**

If a positive dog alert, by itself, is all that is required to establish probable cause, law enforcement will be able to use civil forfeiture to take property such as cash and cars even when there is no other evidence of criminal wrongdoing. Given that more lax procedural requirements apply to civil forfeiture than criminal forfeiture, law enforcement often pursues the civil-forfeiture avenue. Indeed, 80 percent of persons whose property was seized by the federal government for forfeiture were never even charged

---

<sup>60</sup> Radley Balko, *The Mind of a Police Dog: How misconceptions about dogs can lead to abuse of humans*, REASON (Feb. 21, 2011), <http://reason.com/archives/2011/02/21/the-mind-of-a-police-dog> (“When we think dogs are using their well-honed noses to sniff out drugs or criminal suspects, they may actually be displaying a more recently evolved trait: an urgent desire to please their masters, coupled with the ability to read their cues.”).

with a crime.<sup>61</sup> And the vast majority of forfeitures never reach a courtroom.

The ability of property owners to reclaim seized property is meant to be a check on the government's forfeiture power. However, with lax standards of proof for the government and onerous burdens on owners, this ability is more illusory than real. After seizing the property, under federal law (and in most states) the government can have the property forfeited by showing that the property is more likely than not linked to a crime. In 14 states the standard is even less, requiring the government to show only probable cause. Once this minimal threshold is met, in most states and at the federal level, the burden is on the owner to prove their innocence, turning the American ideal of "innocent until proven guilty" on its head.

There are countless examples of police seizing large sums of cash based on nothing more than a positive dog alert.<sup>62</sup> For example, on January 7, 2009,

---

<sup>61</sup> Henry Hyde, *FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE?* 6 (1995).

<sup>62</sup> Perhaps most egregiously, a drug task force in Brown County, Wisconsin, told Beverly Greer, whose son was arrested on drug charges, to bring the \$7,500 in bail money in cash. After piecing together the bail money by visiting a series of ATMs and bringing it to the jail, Greer was informed that a narcotics-detection dog had alerted to the presence of drugs on the currency and that her money would be seized under state civil-forfeiture laws. Radley Balko, *Under Asset Forfeiture Law, Wisconsin Cops Confiscate Families Bail Money*, *THE HUFFINGTON* (Continued on following page)

Anthony Smelley, a 22-year-old college student, was driving on Interstate 70 from Detroit to his aunt's home in St. Louis when he was pulled over by Putnam County, Indiana Lt. Dwight Simmons for making an unsafe lane change and driving with an obscured license plate.<sup>63</sup> Lt. Simmons called in a K-9 unit which sniffed the car for drugs and positively alerted, indicating that drugs might be present. Accordingly, Lt. Simmons searched the car and patted down Smelley and seized a large roll of cash from his front pocket, totaling \$17,500. Smelley, who had received a \$50,000 settlement from a car accident, claimed he was carrying the money to buy a new car for his aunt.

Although no drugs were ever found in Smelley's car and the police never charged Smelley or his passengers with a drug-related crime, Putnam County initiated civil-forfeiture proceedings to confiscate the \$17,500. Smelley's case was batted around the Indiana courts before finally being scheduled for trial on January 29, 2010. In the end, after more than a year elapsed before even having the opportunity to contest the seizure of his \$17,500, Smelley had his money returned to him, without interest.

Similarly, Jerome Chennault was driving through Madison County, Illinois, on his way home to Nevada

---

POST (May 20, 2012), [http://www.huffingtonpost.com/2012/05/20/asset-forfeiture-wisconsin-bail-confiscated\\_n\\_1522328.html](http://www.huffingtonpost.com/2012/05/20/asset-forfeiture-wisconsin-bail-confiscated_n_1522328.html).

<sup>63</sup> Radley Balko, *The Forfeiture Racket*, REASON (Jan. 26, 2010), <http://reason.com/archives/2010/01/26/the-forfeiture-racket..>

after visiting his son in Philadelphia. Chennault was carrying \$22,870 in cash to pay for a down payment on a home.<sup>64</sup> After being pulled over for “following too closely,” police deployed a narcotics-detection dog to sniff his car. The dog alerted to the bag carrying Chennault’s cash. Although no actual drugs were found in the car and Chennault was never charged with a crime, the dog alert was enough to allow police to seize Chennault’s money for civil forfeiture. Over the next several months, Chennault traveled to Illinois at his own expense to contest the forfeiture. Eventually, Chennault won and his money was returned. But he was not reimbursed for his legal or travel expenses.

In light of the above examples and others,<sup>65</sup> it is no surprise that in practice, few property owners,

---

<sup>64</sup> Radley Balko, *Illinois Traffic Stop of Star Trek Fans Raises Concerns About Drug Searches, Police Dogs, Bad Cops*, THE HUFFINGTON POST (Mar. 31, 2012), [http://www.huffingtonpost.com/2012/03/31/drug-search-trekies-stopped-searched-illinois\\_n\\_1364087.html](http://www.huffingtonpost.com/2012/03/31/drug-search-trekies-stopped-searched-illinois_n_1364087.html).

<sup>65</sup> See, e.g., *Jacobson v. \$55,900 in U.S. Currency*, 728 N.W.2d 510 (Minn. 2007) (reviewing order of forfeiture of innocent landlord’s cash kept in safe of apartment he had rented unknowingly to a drug dealer); *State of Utah v. Seventy-Three Thousand One Hundred Thirty Dollars United States Currency*, 31 P.3d 514 (Utah 2001) (reviewing order of forfeiture despite the fact that the government had stipulated that cash was not traced to any drug transactions); *In re Forfeiture of \$18,000*, 471 N.W.2d 628 (Mich. Ct. App. 1991) (reviewing order of forfeiture where police seized money brought as bail after “alert” by narcotics-detection dog).



especially lower-income individuals, can meet the burdens of civil-forfeiture proceedings and often do not challenge seizures of their property. This is particularly true when law enforcement seizes property, the value of which would be greatly exceeded by the time, attorney fees, and other expenses necessary to contest the forfeiture. As a result, many property owners do not challenge the seizure and the government obtains the property by default.

Although dogs can serve as valuable investigative tools, they should not be the sole means to establish probable cause for a search. A rule watering down the probable-cause showing, in contravention of established Fourth Amendment precedent, would vastly expand the power of the law enforcement to seize, forfeit, and profit from the property of innocent owners.

## CONCLUSION

As detailed above, the consequences of allowing an alert by a narcotics-detection dog, on its own, to establish probable cause extend beyond unconstitutional searches of criminal defendants. Unless expressly cabined to the criminal context, such a ruling would allow police to seize innocent owners' property for civil forfeiture. For the foregoing reasons, the



decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

INSTITUTE FOR JUSTICE

WILLIAM H. MELLOR

SCOTT G. BULLOCK

DARPANA M. SHETH

*Counsel of Record*

ROBERT P. FROMMER

901 North Glebe Road, Suite 900

Arlington, VA 22203

Tel.: (703) 682-9320

E-mail: [wmellor@ij.org](mailto:wmellor@ij.org), [sbullock@ij.org](mailto:sbullock@ij.org),  
[dsheth@ij.org](mailto:dsheth@ij.org), [rfrommer@ij.org](mailto:rfrommer@ij.org)

*Counsel for Amicus Curiae*

**AMICUS  
CURIAE  
BRIEF**

---

IN THE  
**Supreme Court of the United States**

---

STATE OF FLORIDA,

*Petitioner,*

*v.*

CLAYTON HARRIS,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF FLORIDA

---

**BRIEF OF AMICI CURIAE  
THE NATIONAL ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS, THE FLORIDA  
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,  
THE AMERICAN CIVIL LIBERTIES UNION,  
AND THE AMERICAN CIVIL  
LIBERTIES UNION OF FLORIDA  
IN SUPPORT OF RESPONDENT**

---

JONATHAN D. HACKER  
CO-CHAIR, SUPREME COURT  
AMICUS COMMITTEE  
NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS  
1625 Eye Street, N.W.  
Washington, D.C. 20006

MASON C. CLUTTER  
NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS  
1660 L Street, N.W., 12th Floor  
Washington, D.C. 20036

DANIELLE SPINELLI  
*Counsel of Record*  
ANNIE L. OWENS  
MADHU CHUGH  
WEILI J. SHAW  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
(202) 663-6000  
danielle.spinelli@wilmerhale.com

**ADDITIONAL COUNSEL LISTED ON INSIDE COVER**

---

**STEVEN R. SHAPIRO  
EZEKIEL R. EDWARDS  
AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
125 Broad Street, 18th Floor  
New York, N.Y. 10004**

**MICHAEL UFFERMAN  
CO-CHAIR, AMICUS COMMITTEE  
FLORIDA ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS  
2022-1 Raymond Diehl Road  
Tallahassee, FL 32308**

**SONYA RUDENSTINE  
CO-CHAIR, AMICUS COMMITTEE  
FLORIDA ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS  
204 West University Avenue, Suite  
Gainesville, FL 32601**

**RANDALL C. MARSHALL  
MARIA KAYANAN  
AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION OF FLORIDA  
4500 Biscayne Blvd., Suite 340  
Miami, FL 33137**

## **QUESTION PRESENTED**

Whether an alert by a narcotics-detection dog that law enforcement asserts is "trained" or "certified" is sufficient as a matter of law to establish probable cause for a warrantless search, without any additional evidence of the dog's reliability.





## TABLE OF CONTENTS

|                                                                                                                                                                 | Page |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| QUESTION PRESENTED.....                                                                                                                                         | i    |
| TABLE OF AUTHORITIES.....                                                                                                                                       | v    |
| INTEREST OF AMICI CURIAE.....                                                                                                                                   | 1    |
| SUMMARY OF ARGUMENT.....                                                                                                                                        | 2    |
| ARGUMENT.....                                                                                                                                                   | 3    |
| I. AN ALERT BY A “TRAINED” OR “CERTIFIED” NARCOTICS-DETECTION DOG, WITHOUT EVIDENCE OF THE DOG’S RELIABILITY, IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE ..... | 3    |
| A. Evidence Regarding A Dog’s Reliability Should Form Part Of The Totality-Of-The-Circumstances Analysis .....                                                  | 3    |
| B. Real-World Data Demonstrate That Even Trained Or Certified Dogs Have A High Rate Of False Alerts And Vary Greatly In Accuracy Rates.....                     | 6    |
| C. The High Rate Of False Alerts Has Multiple, Overlapping Causes, Which Are Often Exacerbated By Flawed Training And Certification Procedures .....            | 9    |
| 1. Handler cueing .....                                                                                                                                         | 10   |
| 2. Detection of lawful substances .....                                                                                                                         | 16   |
| 3. Residual odors .....                                                                                                                                         | 20   |
| II. UNDER A TOTALITY-OF-THE-CIRCUMSTANCES APPROACH, A VARIETY OF FACTORS ARE RELEVANT TO WHETHER A DOG ALERT CONSTITUTES PROBABLE CAUSE .....                   | 22   |

**TABLE OF CONTENTS—Continued**

|                                                                                                               | Page |
|---------------------------------------------------------------------------------------------------------------|------|
| A. A Number Of Different Factors Are Relevant To A Dog's Reliability .....                                    | 22   |
| 1. Rigorousness of the training and certification program at issue .....                                      | 22   |
| 2. Records of a dog's actual performance in the field .....                                                   | 25   |
| 3. Experience and training of the dog's handler .....                                                         | 30   |
| B. Conducting A Totality-Of-The-Circumstances Inquiry Into A Dog's Reliability Is Not Unduly Burdensome ..... | 31   |
| CONCLUSION .....                                                                                              | 34   |

## TABLE OF AUTHORITIES

## CASES

|                                                                                                                    | Page(s)     |
|--------------------------------------------------------------------------------------------------------------------|-------------|
| <i>Brinegar v. United States</i> , 338 U.S. 160 (1949).....                                                        | 4, 31       |
| <i>Commonwealth v. Ramos</i> , 894 N.E.2d 611<br>(Mass. App. Ct. 2008) .....                                       | 21          |
| <i>Horton ex rel. Horton v. Goose Creek<br/>Independent School District</i> , 690 F.2d<br>470 (5th Cir. 1982)..... | 17          |
| <i>Illinois v. Caballes</i> , 543 U.S. 405 (2005) .....                                                            | 5, 6        |
| <i>Illinois v. Gates</i> , 462 U.S. 213 (1983).....                                                                | 2, 4, 5, 31 |
| <i>Maryland v. Dyson</i> , 527 U.S. 465 (1999).....                                                                | 3, 4        |
| <i>McCray v. Illinois</i> , 386 U.S. 300 (1967) .....                                                              | 31          |
| <i>Merrett v. Moore</i> , 58 F.3d 1547 (11th Cir. 1995).....                                                       | 9           |
| <i>Sgro v. United States</i> , 287 U.S. 206 (1932).....                                                            | 29          |
| <i>State v. England</i> , 19 S.W.3d 762 (Tenn. 2000) .....                                                         | 33          |
| <i>State v. Helzer</i> , 252 P.3d 288 (Or. 2011).....                                                              | 21          |
| <i>State v. Lockstedt</i> , 695 N.W.2d 718 (S.D. 2005).....                                                        | 14          |
| <i>State v. Nguyen</i> , 726 N.W.2d 871 (S.D. 2007).....                                                           | 33          |
| <i>United States v. Christy</i> , 2008 WL 753888<br>(D. Neb. Mar. 19, 2008) .....                                  | 14          |
| <i>United States v. Diaz</i> , 25 F.3d 392 (6th Cir. 1994) .....                                                   | 33          |
| <i>United States v. Florez</i> , 871 F. Supp. 1411<br>(D.N.M. 1994) .....                                          | 26, 28, 33  |
| <i>United States v. Foree</i> , 43 F.3d 1572<br>(11th Cir. 1995).....                                              | 31          |
| <i>United States v. Grubbs</i> , 547 U.S. 90 (2006) .....                                                          | 4, 29, 32   |

**TABLE OF AUTHORITIES—Continued**

|                                                                                                                                                                                   | Page(s) |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| <i>United States v. Koerth</i> , 312 F.3d 862<br>(7th Cir. 2002).....                                                                                                             | 31      |
| <i>United States v. Limares</i> , 269 F.3d 794<br>(7th Cir. 2001).....                                                                                                            | 33      |
| <i>United States v. Lingenfelter</i> , 997 F.2d 632<br>(9th Cir. 1993).....                                                                                                       | 33      |
| <i>United States v. One Million, Thirty-Two<br/>Thousand, Nine Hundred Eighty Dollars<br/>in U.S. Currency (\$1,032,980.00)</i> , 2012 WL<br>684757 (N.D. Ohio Mar. 2, 2012)..... | 19      |
| <i>United States v. Place</i> , 462 U.S. 696 (1983).....                                                                                                                          | 5       |
| <i>United States v. Ross</i> , 456 U.S. 798 (1982) .....                                                                                                                          | 4       |
| <i>United States v. Trayer</i> , 898 F.2d 805<br>(D.C. Cir. 1990) .....                                                                                                           | 12, 14  |
| <i>United States v. Ventresca</i> , 380 U.S. 102 (1965) .....                                                                                                                     | 4       |
| <i>United States v. Wagner</i> , 989 F.2d 69<br>(2d Cir. 1993).....                                                                                                               | 29      |

**STATUTES**

|                                             |    |
|---------------------------------------------|----|
| Fla. Admin. Code Ann. 11B-27.013(1)(a)..... | 23 |
|---------------------------------------------|----|

**OTHER AUTHORITIES**

|                                                                                                                           |    |
|---------------------------------------------------------------------------------------------------------------------------|----|
| Balona, Patricio G., <i>Courts Raise Drug-Dog<br/>Questions</i> , Daytona Beach News-Journal,<br>May 9, 2011, at 1A ..... | 32 |
|---------------------------------------------------------------------------------------------------------------------------|----|

## TABLE OF AUTHORITIES—Continued

|                                                                                                                                                                                                                                                                           | Page(s)                |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------|
| Bird, Robert C., <i>An Examination of the Training and Reliability of the Narcotics Detection Dog</i> , 85 Ky. L.J. 405 (1997) .....                                                                                                                                      | 14, 15, 21, 28, 30, 32 |
| Bradford, Michelle, <i>Actions by Drug Dogs Key in Arrests</i> , Ark. Democrat-Gazette, May 3, 2004 .....                                                                                                                                                                 | 32                     |
| Budd, Lawrence, <i>Lack of Training Can Come Back to Bite Police K-9 Units</i> , Dayton Daily News, May 23, 2011, at A4 .....                                                                                                                                             | 24                     |
| Derr, Mark, <i>With Dog Detectives, Mistakes Can Happen</i> , N.Y. Times, Dec. 24, 2002, at F3 .....                                                                                                                                                                      | 10, 19, 28             |
| Ensminger, John J., <i>Police and Military Dogs</i> (2012) .....                                                                                                                                                                                                          | 10, 20                 |
| Ensminger, John J., & L.E. Papet, <i>Cueing and Probable Cause</i> (2011), available at <a href="http://www.animallaw.info/articles/arusensminger_papet2011.htm">http://www.animallaw.info/articles/arusensminger_papet2011.htm</a> .....                                 | 12                     |
| Furton, Kenneth G., et al., <i>Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction—Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency</i> , 40 J. Chromatographic Sci. 147 (2002) ..... | 16, 17                 |

## TABLE OF AUTHORITIES—Continued

|                                                                                                                                                                                                                                                                                                   | Page(s)                    |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|
| Furton, Kenneth, et al., <i>The Scientific Working Group on Dog and Orthogonal Detector Guidelines</i> (2010), available at <a href="https://www.ncjrs.gov/pdffiles1/nij/grants/231952.pdf">https://www.ncjrs.gov/pdffiles1/nij/grants/231952.pdf</a> .....                                       | 15, 23, 25                 |
| Furton, Kenneth G., & Douglas P. Heller, <i>Advances In the Reliable Location of Forensic Specimens Through Research and Consensus</i> , 3 Canadian J. Police & Sec. Servs. 97 (2005) .....                                                                                                       | 23, 25                     |
| Goldblatt, Allen, et al., <i>Olfaction and Explosives Detector Dogs, in Canine Ergonomics</i> (William S. Helton ed., 2009) .....                                                                                                                                                                 | 21                         |
| Handwerk, Brian, “Detector Dogs” Sniff Out Smugglers for U.S. Customs, Nat’l Geographic News, July 12, 2002, available at <a href="http://news.nationalgeographic.com/news/2002/07/0712_020712_drugdogs.html">http://news.nationalgeographic.com/news/2002/07/0712_020712_drugdogs.html</a> ..... | 30                         |
| Hinkel, Dan, & Joe Mahr, <i>Drug Dogs Often Wrong</i> , Chi. Trib., Jan. 26, 2011, at C1 .....                                                                                                                                                                                                    | 8, 9, 30                   |
| Johnston, J.M., <i>Canine Detection Capabilities</i> (1990), available at <a href="http://www.barksar.org/K-9_Detection_Capabilities.pdf">http://www.barksar.org/K-9_Detection_Capabilities.pdf</a> .....                                                                                         | 16, 27                     |
| Katz, Lewis R., & Aaron P. Golembiewski, <i>Curbing the Dog</i> , 85 Neb. L. Rev. 735 (2007) .....                                                                                                                                                                                                | 15, 17, 18, 23, 24, 27, 30 |
| Kubinyi, Eniko, et al., <i>Dogs (Canis familiaris) Learn From Their Owners via Observation in a Manipulation Task</i> , 117 J. Comp. Psychol. 156 (2003) .....                                                                                                                                    | 11                         |



## TABLE OF AUTHORITIES—Continued

|                                                                                                                                                                                                                                                         | Page(s)            |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| Lit, Lisa, et al., <i>Handler Beliefs Affect Scent Detection Dog Outcomes</i> , 14 <i>Animal Cognition</i> 387 (2011) .....                                                                                                                             | 12, 13, 15         |
| Lorenzo, Norma, et al., <i>Laboratory and Field Experiments Used to Identify Canis lupus var. familiaris Active Odor Signature Chemicals from Drugs, Explosives, and Humans</i> , 376 <i>Analytical &amp; Bioanalytical Chemistry</i> 1212 (2003) ..... | 16, 18             |
| Lunney, Leslie A., <i>Has the Fourth Amendment Gone to the Dogs?</i> , 88 <i>Or. L. Rev.</i> 829 (2009) .....                                                                                                                                           | 16, 17, 18, 19, 23 |
| Macias, Michael S., et al., <i>A Comparison of Real Versus Simulated Contraband VOCs for Reliable Detector Dog Training Utilizing SPME-GC-MS</i> , 40 <i>Am. Lab.</i> 16 (2008) .....                                                                   | 17                 |
| Mesloh, Charles, et al., <i>Scent as Forensic Evidence and Its Relationship to the Law Enforcement Canine</i> , 52 <i>J. Forensic Identification</i> 169 (2002) .....                                                                                   | 10, 27, 30         |
| Mesloh, Charles, & Jennifer James-Mesloh, <i>Trained Dogs in the Crime Scene Search</i> , 56 <i>J. Forensic Identification</i> 534 (2006) .....                                                                                                         | 10                 |
| Miklósi, Ádám, et al., <i>Use of Experimenter-Given Cues in Dogs</i> , 1 <i>Animal Cognition</i> 113 (1998) .....                                                                                                                                       | 11                 |
| Minzner, Max, <i>Putting Probability Back into Probable Cause</i> , 87 <i>Tex. L. Rev.</i> 913 (2009) .....                                                                                                                                             | 33                 |

TABLE OF AUTHORITIES—Continued

|                                                                                                                                                                                                                                                                                                                                               | Page(s)       |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| Myers, II, Richard E., <i>Detector Dogs and Probable Cause</i> , 14 Geo. Mason L. Rev. 1 (2006).....                                                                                                                                                                                                                                          | 9, 21, 24, 29 |
| Myers, II, Richard E., <i>In the Wake of Caballes, Should We Let Sniffing Dogs Lie?</i> , 20 Crim. Just. 4 (Winter 2006).....                                                                                                                                                                                                                 | 19, 26        |
| National Narcotic Detector Dog Ass'n, <i>Narcotic Detection Standards</i> (July 17, 2008), available at <a href="http://www.nndda.org/official-docs/doc_view/2-narcotics-detection-standard?tmpl=component&amp;format=raw">http://www.nndda.org/official-docs/doc_view/2-narcotics-detection-standard?tmpl=component&amp;format=raw</a> ..... | 20            |
| National Police Canine Ass'n, <i>Standards for Training &amp; Certification Manual</i> (Dec. 27, 2011), available at <a href="http://www.npca.net/Files/Standards/Standards.pdf">http://www.npca.net/Files/Standards/Standards.pdf</a> .....                                                                                                  | 20            |
| North American Police Work Dog Ass'n, <i>By-laws and Certification Rules</i> (June 19, 2011), available at <a href="http://www.napwda.com/uploads/bylaws-cert-rules.pdf">http://www.napwda.com/uploads/bylaws-cert-rules.pdf</a> .....                                                                                                        | 20            |
| NSW Ombusdman, <i>Review of the Police Powers (Drug Detection Dogs) Act 2001</i> (2006), available at <a href="http://www.ombo.nsw.gov.au/publication/PDF/other%20reports/ReviewPolicePowers_DrugDetectionDogs_Jun06.pdf">http://www.ombo.nsw.gov.au/publication/PDF/other%20reports/ReviewPolicePowers_DrugDetectionDogs_Jun06.pdf</a> ..... | 7, 8          |
| Parmeter, John E., et al., <i>Guide for the Selection of Drug Detectors for Law Enforcement Applications</i> (2000), available at <a href="https://www.ncjrs.gov/pdffiles1/nij/183260.pdf">https://www.ncjrs.gov/pdffiles1/nij/183260.pdf</a> .....                                                                                           | 20            |

## TABLE OF AUTHORITIES—Continued

|                                                                                                                                                                                                                                                                                                                               | Page(s) |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| Patty, Anna, <i>Sniffer Dogs Get it Wrong Four Out of Five Times</i> , Sydney Morning Herald, Dec. 12, 2011.....                                                                                                                                                                                                              | 7       |
| Pfungst, Oskar, <i>Clever Hans</i> (Robert Rosenthal ed., 1965) .....                                                                                                                                                                                                                                                         | 11      |
| Sachs, Jessica Snyder, <i>The Fake Smell of Death</i> , Discover, Mar. 1996, available at <a href="http://discovermagazine.com/1996/mar/thefakesmellofde714/">http://discovermagazine.com/1996/mar/thefakesmellofde714/</a> .....                                                                                             | 18, 19  |
| Smith, Mark E., <i>Going to the Dogs</i> , 46 Hous. L. Rev. 103 (2009).....                                                                                                                                                                                                                                                   | 15      |
| Soproni, Krisztina, et al., <i>Dogs' (Canis familiaris) Responsiveness to Human Pointing Gestures</i> , 116 J. Comp. Psychol. 27 (2002) .....                                                                                                                                                                                 | 11      |
| Topál, József, et al., <i>Reproducing Human Actions and Action Sequences: "Do as I Do!" in a Dog</i> , 9 Animal Cognition 355 (2006).....                                                                                                                                                                                     | 11      |
| United Nations Office on Drugs and Crime, Regional Office for South Asia, <i>Precursor Control at a Glance</i> (2006), available at <a href="http://www.unodc.org/documents/southasia/reports/Precursor_Control_at_a_Glance.pdf">http://www.unodc.org/documents/southasia/reports/Precursor_Control_at_a_Glance.pdf</a> ..... | 18      |
| United States Police Canine Ass'n, <i>Certification Rules and Regulations</i> (2012), available at <a href="http://www.uspcak9.com/certification/USPCARulebook2012.pdf">http://www.uspcak9.com/certification/USPCARulebook2012.pdf</a> .....                                                                                  | 20      |
| Virányi, Zsófia, et al., <i>Dogs Respond Appropriately to Cues of Humans' Attentional Focus</i> , 66 Behav. Processes 161 (2004) .....                                                                                                                                                                                        | 11      |

## TABLE OF AUTHORITIES—Continued

|                                                                                                                                          | Page(s) |
|------------------------------------------------------------------------------------------------------------------------------------------|---------|
| Waggoner, L. Paul, et al., <i>Canine Olfactory Sensitivity to Cocaine Hydrochloride and Methyl Benzoate</i> , 2937 SPIE 216 (1997) ..... | 17      |
| Waggoner, L. Paul, et al., <i>Effects of Extraneous Odors on Canine Detection</i> , 3575 SPIE 355 (1998) .....                           | 27      |
| Weiner, Jeffrey S., <i>Canines and the Constitution</i> , 23 Florida Defender 41 (Winter 2011).....                                      | 25      |

## INTEREST OF AMICI CURIAE<sup>1</sup>

Amicus curiae the National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit, professional bar association representing public defenders and private criminal defense lawyers across the nation. Founded in 1958, NACDL has a direct national membership of more than 10,000 attorneys and more than 28,000 affiliate members from all fifty states. Amicus curiae the Florida Association of Criminal Defense Lawyers is NACDL’s Florida affiliate. NACDL’s mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice and the defense of individual liberties. Most significantly for purposes of this case, NACDL has a strong interest in ensuring that the Fourth Amendment remains a robust protection against unreasonable encroachments on individual privacy.

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. In furtherance of that mission, the ACLU has participated as a party or amicus in numerous cases before this Court raising Fourth Amendment issues, including *Illinois v. Caballes*, 543 U.S. 405 (2005). The American Civil Liber-

---

<sup>1</sup> Letters consenting to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

ties Union of Florida is a state affiliate of the national ACLU.<sup>2</sup>

### SUMMARY OF ARGUMENT

This case presents the question whether an alert by a narcotics-detection dog, together with the government's statement that the dog is "trained" or "certified," is sufficient to constitute probable cause for a physical search, in the absence of any other evidence of the dog's reliability.

The State would have this Court hold that "evidence that a dog has been trained or certified by canine professionals should be deemed conclusive" of the probable-cause inquiry, irrebuttable except by a showing that the training or certifying organization is a "sham." Pet. Br. 32 & 33 n.7. In its view, absent "extraordinary circumstances," *id.* 24, courts should not consider the nature or quality of the dog's training and certification; the dog's record of false alerts in the field; or other evidence that the dog is not reliable, in the sense that its alert is not likely to lead to contraband.

That rigid approach cannot be reconciled with this Court's recognition that the existence of probable cause must be determined in light of the totality of the circumstances. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983). And it will unacceptably dilute the probable-cause standard. An alert from a "trained" or "certified" dog, absent further evidence of the dog's reliability, simply does not establish the necessary fair probability that a physical search will reveal contraband. To the

---

<sup>2</sup> Amici acknowledge and thank Professors Lawrence J. Myers and Richard E. Myers II for their assistance.



contrary, empirical studies show that even trained and certified dogs have a high rate of false alerts in the real world and that the accuracy rate among those dogs varies greatly. Moreover, training and certification procedures—far from conclusively establishing a dog's reliability—are frequently flawed in a manner that contributes to this high rate of false alerts.

Accordingly, under a totality-of-the-circumstances approach, the mere fact of training or certification, standing alone, cannot be sufficient to establish probable cause. Instead, a number of different factors are relevant to the question whether a particular dog is sufficiently reliable for its alert to establish probable cause. Those factors include the rigorousness of the training or certification program; records of the dog's actual performance in the field, including its history of false alerts; and the experience and training of the dog's handler. Excluding those factors from the probable-cause inquiry significantly weakens the Fourth Amendment's central protection against unreasonable searches.

## **ARGUMENT**

### **I. AN ALERT BY A "TRAINED" OR "CERTIFIED" NARCOTICS-DETECTION DOG, WITHOUT EVIDENCE OF THE DOG'S RELIABILITY, IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE**

#### **A. Evidence Regarding A Dog's Reliability Should Form Part Of The Totality-Of-The-Circumstances Analysis**

1. "The Fourth Amendment generally requires police to secure a warrant before conducting a search," *Maryland v. Dyson*, 527 U.S. 465, 466 (1999), and "a warrant may issue only upon a finding of 'probable

cause,” *United States v. Ventresca*, 380 U.S. 102, 107 (1965). This Court has recognized “an exception to this requirement for searches of vehicles.” *Dyson*, 527 U.S. at 466. However, a warrantless search of a vehicle still must be “supported by probable cause” and “based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.” *United States v. Ross*, 456 U.S. 798, 809 (1982).

Probable cause to search exists when “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). In other words, “the probable-cause requirement looks to whether evidence will be found *when the search is conducted*.” *United States v. Grubbs*, 547 U.S. 90, 95 (2006). The probable-cause determination is “an act of judgment formed in the light of the particular situation and with account taken of all the circumstances.” *Brinegar v. United States*, 338 U.S. 160, 176 (1949). The Court has described this analysis as a “totality-of-the-circumstances approach.” *Gates*, 462 U.S. at 230; *id.* at 232 (“[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.”).

Accordingly, an alert by a narcotics-detection dog constitutes probable cause to search a vehicle only if, considering the “totality of the circumstances,” there is a “fair probability” that illegal drugs will be found in the vehicle. This inquiry necessarily requires assessing whether there is a fair probability that the dog’s alert will turn out to be correct—that is, that it will accurately indicate the presence of illegal drugs—or, conversely, whether it is likely to turn out to be a “false positive” or “false alert.”

2. Although the State concedes (at 11-15) that a court must assess probable cause under the totality of the circumstances, it nonetheless advocates a rule that would reduce that analysis to a single question. Under the State's rule, the fact that a dog has been either trained or certified for narcotics detection—no matter what organization conducted the training or certification, no matter what methods and standards were used, and no matter what the dog's actual record of accurate versus false alerts may be—would be sufficient, without more, to establish probable cause to search whenever the dog gives an alert. Pet. Br. 22.<sup>3</sup>

But artificially circumscribing a court's consideration of reliability in this manner—and thus cutting short the inquiry into the “particular factual context[]” of the dog's alert, *Gates*, 462 U.S. at 232—would dramatically weaken the probable-cause requirement. A dog-and-handler team's training and reliability indisputably play an important role in determining whether a dog alert is likely to be accurate. See Pet. Br. 15-16.<sup>4</sup>

---

<sup>3</sup> The State also proposes (at 22) that a dog alert can constitute probable cause even when a dog has been neither formally trained nor certified in drug detection, but it does not elaborate on what criteria should be used in assessing the reliability of such an alert.

<sup>4</sup> This Court has recognized the importance of training and reliability in a related context. In considering whether a dog sniff of a vehicle constitutes a Fourth Amendment search, this Court limited its holding to “*well-trained* narcotics-detection dog[s]” that “do[] not expose noncontraband items that otherwise would remain hidden from public view.” *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (emphasis added) (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)). Contrary to the State's suggestion (at 20), however, this Court did not hold that a dog with any amount of

The mere fact of training or certification, however, cannot replace an individualized assessment of reliability, particularly given that trained or certified dogs do not consistently demonstrate a level of reliability sufficient to establish probable cause.<sup>5</sup> In fact, as discussed below, the empirical evidence shows the opposite: Even trained or certified dogs frequently make false alerts, and their reliability varies greatly.

**B. Real-World Data Demonstrate That Even Trained Or Certified Dogs Have A High Rate Of False Alerts And Vary Greatly In Accuracy Rates**

Studies of narcotics-detection dogs' reliability in real-world settings are remarkably consistent regarding two key points, which refute the State's contention that the mere fact of training or certification guarantees reliability. First, for any given occasion on which a dog alerts to the presence of illegal narcotics, it is likely—and, according to several studies, very likely—that illegal narcotics will not be found in the indicated location. Second, even trained and certified dogs vary tremendously in their reliability. One study found that trained and certified dogs ranged from 7% to 56% in accuracy, and aggregate evidence demonstrates an even wider range.

---

training—regardless of where and by whom it was performed—is necessarily a “well-trained” dog.

<sup>5</sup> Because this case is limited to the context of general law enforcement, this Court need not determine what standards should apply in other contexts, such as situations involving dog sniffs for explosives, which present issues beyond the scope of the question presented. See *Caballes*, 543 U.S. at 417 n.7 (Souter, J., dissenting); *id.* at 423 (Ginsburg, J., dissenting).

The most comprehensive data available on the rate of false alerts by narcotics-detection dogs in real-world settings come from a two-year-long study conducted by an independent government agency in Australia. See NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001* (2006), available at [http://www.ombo.nsw.gov.au/publication/PDF/other%20reports/ReviewPolicePowers\\_DrugDetectionDogs\\_Jun06.pdf](http://www.ombo.nsw.gov.au/publication/PDF/other%20reports/ReviewPolicePowers_DrugDetectionDogs_Jun06.pdf). Each dog in the study underwent an extensive training and certification regimen. Police first trained the dogs to detect cannabis, cocaine, heroin, and various forms of amphetamines, including ecstasy. *Id.* at 21, 45. After an initial six-week training period, each dog received additional weekly training and was accredited, or tested for accuracy, every three months. *Id.* at 45.

Over the two-year study period, the dogs generated more than 10,211 alerts, generally to individuals in public spaces. *Id.* at 27, 29. These alerts almost always resulted in a search. *Id.* at 197. For 7,547 of these alerts—approximately 74%—the search found no illegal drugs in the location indicated. *Id.* at 30. Police searches located illegal drugs in only 26% of cases in which the dogs alerted. *Id.* In other words, any given alert was almost three times more likely to be a false alert than an accurate one.<sup>6</sup>

The study also found dramatic variations in the accuracy of alerts by different dogs, ranging from a high

---

<sup>6</sup> More recent data from New South Wales show an even higher rate of false alerts. In 2011, no drugs were found in 11,248 cases out of a total of 14,102 alerts—a false-alert rate of approximately 80%. See Patty, *Sniffer Dogs Get it Wrong Four Out of Five Times*, Sydney Morning Herald, Dec. 12, 2011.



of 56% to a low of 7%. *Id.* at 57 tbl. 9. The average accuracy of 26% was skewed upward by a few dogs with better reliability; in fact, almost two thirds of the individual dogs had an accuracy rate *below* 26%. *Id.* These differences arose even though all of the dogs were the same breed and underwent the same training and certification program. *Id.* at 21, 45.

Based on the high likelihood of false alerts, the New South Wales study concluded that “[s]imply relying on a drug detection dog indication alone is not in our view sufficient to form a reasonable suspicion that a person is *currently* in possession of a prohibited drug” and recommended that police be “required to take into account the drug detection dog indication plus other relevant factors.” *Id.* at 201. The study further recommended that police collect and make available data on the accuracy of individual dogs in real-world settings. *Id.* at 202.

Empirical evidence from the United States confirms the Australian studies’ findings. In 2011, for example, the Chicago Tribune studied police use of narcotics-detection dogs during traffic stops, using records from the Illinois Department of Transportation. Hinkel & Mahr, *Drug Dogs Often Wrong*, Chi. Trib., Jan. 26, 2011, at C1. The records covered stops from 2007 to 2009 conducted by several suburban police departments near Chicago. *Id.* The analysis revealed that drugs or paraphernalia were found after only 44% of alerts. *Id.* The accuracy rate varied significantly by police department; for the department with the most alerts, the accuracy rate was only 32%. *Id.* The rate was even lower when dogs alerted to a car with a Hispanic driver; across all departments, only 27% of such alerts led to the discovery of illegal drugs. *Id.* For one police department, the accuracy of alerts to Hispanic



drivers was a mere 8%—or a false-alert rate of 92%. *Id.*

The Eleventh Circuit has also recognized the unreliability of narcotics-detection dogs and their high rate of false alerts. See *Merrett v. Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995). *Merrett* involved an operation by Florida state police in which they stopped cars at roadblocks, and then used narcotics-detection dogs to sniff the cars' exteriors. See *id.* If a dog alerted, police employed a second dog to sniff the car. If the second dog also alerted, police would search the car, obtaining a search warrant if the driver withheld consent. *Id.*

During the two-day operation, Florida police stopped approximately 1,330 vehicles. The dogs ultimately alerted to 28 vehicles. Of those 28 alerts, only one led to an arrest for possession of illegal narcotics. *Id.* In other words, despite the requirement that two dogs alert before a search, police found illegal narcotics sufficient to justify an arrest in only 4% of cars searched; the likelihood of a false alert was approximately 96%.

**C. The High Rate Of False Alerts Has Multiple, Overlapping Causes, Which Are Often Exacerbated By Flawed Training And Certification Procedures**

A number of factors explain why narcotics-detection dogs, which indisputably have olfactory abilities that far exceed those of humans, see, e.g., Myers, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. 1, 3-4 (2006), are nonetheless highly likely to produce false alerts in real-world settings. These errors

may sometimes arise from failures by the dog itself.<sup>7</sup> For the most part, however, such errors are rooted in failures in the interactions between detection dogs and their human handlers, which can often be exacerbated by flawed training or certification procedures. Indeed, precisely because faulty training or certification procedures contribute to a high rate of false alerts among narcotics-detection dogs, training or certification cannot alone be sufficient proof of reliability.

### 1. Handler cueing

a. A key source of error is the possibility that dogs will respond, not to an odor they have detected, but rather to external cues, conscious or unconscious, from handlers or others. This phenomenon, known as handler cueing, is vividly illustrated by the investigation—now one of the most celebrated in the history of animal-behavior studies—of a horse named “Clever Hans.”

---

<sup>7</sup> Diet, sleep, exercise, stress, and contact with other dogs can all affect a dog’s performance. Mesloh, et al., *Scent as Forensic Evidence and Its Relationship to the Law Enforcement Canine*, 52 J. Forensic Identification 169, 178 (2002); see also *id.* (“[T]he canine is a biological instrument and, as such, can influence findings inadvertently. There is an almost endless list of factors that can influence the performance of the dog.”). Moreover, in any given year about “35 percent of detection dogs temporarily lose their sense of smell because of illness, tooth decay[,] or other physical problems.” See Derr, *With Dog Detectives, Mistakes Can Happen*, N.Y. Times, Dec. 24, 2002, at F3. These and other factors can cause a dog’s skills to vary at different times, and a dog can succeed at a task on one day and fail at the same task on another. Ensminger, *Police and Military Dogs* 11 (2012) (citing Mesloh & James-Mesloh, *Trained Dogs in the Crime Scene Search*, 56 J. Forensic Identification 534 (2006)).

Clever Hans was purportedly able to solve math problems posed by questioners by tapping the answer with his hoof. See Pfungst, *Clever Hans* 1 (Rosenthal ed., 1965). A panel of experts scrutinized the process and concluded that no intentional signals were passed from the questioner to the horse. *Id.* at 5-6. Only after psychologist Oskar Pfungst performed a series of rigorous tests—including, crucially, double-blind testing in which the questioner was unaware of the correct answer—was it revealed that Clever Hans was in fact responding to *unintentional* cues from the questioner. For example, questioners tended to tilt their head down when they expected Clever Hans to start tapping, and to lift their head up slightly when they expected him to stop. *Id.* at 47-48. Although the questioners made these movements unconsciously, Pfungst could duplicate them and thereby cause Clever Hans to tap at will. These findings led Pfungst to conclude that “Hans’s accomplishments are founded first upon a one-sided development of the power of perceiving the slightest movements of the questioner.” *Id.* at 240.

The “Clever Hans” phenomenon also affects dogs, which are well known to be keen observers of human behavior.<sup>8</sup> It is therefore unsurprising that handler

---

<sup>8</sup> See, e.g., Miklósi, et al., *Use of Experimenter-Given Cues in Dogs*, 1 *Animal Cognition* 113, 115, 118-119 (1998) (dogs learn cues—such as pointing, bowing, nodding, head-turning, and glancing—through repetition to obtain treat or reward); Soproni, et al., *Dogs’ (Canis familiaris) Responsiveness to Human Pointing Gestures*, 116 *J. Comp. Psychol.* 27, 33 (2002) (dogs reliably respond to human pointing gestures); Kubinyi, et al., *Dogs (Canis familiaris) Learn From Their Owners via Observation in a Manipulation Task*, 117 *J. Comp. Psychol.* 156 (2003); Topál, et al., *Reproducing Human Actions and Action Sequences: “Do as I Do!” in a Dog*, 9 *Animal Cognition* 355 (2006); Virányi, et al., *Dogs Respond Appro-*

cueing may also cause false alerts by narcotics-detection dogs. See *United States v. Trayer*, 898 F.2d 805, 809 (D.C. Cir. 1990). A host of cues may prompt false alerts. For example, handlers may

cue dogs by changes in their voices (pitch, timing, volume); distracting a dog by talking continuously; praising a dog too much or too soon; reaching for a reward too soon; making movements that appeared to signal a dog, including circling back to previously sniffed locations, changing pace, staring at a place where an item may be hidden, tapping surfaces repeatedly, increasing tension on the leash, making various hand movements, suddenly stopping or standing still, and standing a long time in the vicinity of a possible target.

Ensminger & Papet, *Cueing and Probable Cause* (2011), available at [http://www.animallaw.info/articles/arusersminger\\_papet2011.htm](http://www.animallaw.info/articles/arusersminger_papet2011.htm).

Indeed, a recent study at the University of California, Davis confirms that handler cueing causes false alerts by detection dogs. See Lit, et al., *Handler Beliefs Affect Scent Detection Dog Outcomes*, 14 *Animal Cognition* 387, 387 (2011). The study included eighteen dog-and-handler teams, all of which had been certified by a law-enforcement agency. *Id.* at 388-389. On average, the handlers had approximately five years of scent-detection experience, and the dogs had three. *Id.* at 389 tbl. 1.

---

*priately to Cues of Humans' Attentional Focus*, 66 *Behav. Processes* 161 (2004).

The dog-and-handler teams were to detect their target scents in four rooms. Handlers were told that each room might contain up to three targets; in fact, however, none of the rooms contained any target scents. Each team conducted two runs through the four rooms; together, they gave a total of 225 false alerts. *Id.* at 390.<sup>9</sup> In some of the rooms, handlers were falsely told that a scent had been placed at a particular marked location. The dogs were far more likely to give a false alert at the marked location than at other locations, and were more likely to give a false alert in a room with a marked location than in a room without one. *Id.* at 391, 393 tbl. 2. In other words, the handler's belief that the target scent was present in a marked location significantly increased the likelihood that the dog would alert in that location. Moreover, the dog-and-handler teams varied substantially in their accuracy. The best-performing team gave no false alerts (the only team to do so); the worst-performing team gave anywhere from two to five false alerts in each room. *Id.* at 390 fig. 1.

After the test, "three handlers admitted to overtly cueing their dogs to alert at the marked locations." *Id.* at 392. Most of the other false alerts at the marked locations were likely caused by unconscious cueing. Regardless of whether the cueing was intentional or unintentional, these results demonstrate "that handler beliefs affect outcomes of scent detection dog deployments." *Id.* at 387.

---

<sup>9</sup> Because the target substances were not present in any of the rooms, the false alert rate was 100%.



The potential for handler cueing is particularly problematic in the context of real-world police stops, in which dog handlers will often have formed subjective expectations as to whether narcotics are likely to be found. In such circumstances, the handler's expectations may well influence the dog's behavior via conscious or unconscious cueing and therefore create the possibility of a false alert. See, e.g., *United States v. Christy*, 2008 WL 753888, at \*11 (D. Neb. Mar. 19, 2008) (after driver declined consent to search vehicle, officer induced his narcotics-detection dog to alert, a suspicion the court concluded was "borne out by the court's review of the handler's conduct in the videotape"); *State v. Lockstedt*, 695 N.W.2d 718, 726-727 (S.D. 2005) (officer admitted to "encourag[ing]" an alert during dog sniff of vehicle that occurred after driver declined consent to search).

b. Flawed training and certification procedures can exacerbate the problem of handler cueing. Often, dogs are trained or "certified in closed situations where the handler is aware of the location of drugs," a scenario that causes handler cueing to be "more pronounced." Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 424 (1997); see also *Trayer*, 898 F.2d at 809 ("less than scrupulously neutral procedures, which create at least the possibility of unconscious 'cuing', may well jeopardize the reliability of dog sniffs"). Such training methods may reinforce rather than inhibit dogs' natural willingness to respond to handler cues.<sup>10</sup> Indeed, some

---

<sup>10</sup> The State concedes (at 5) that such techniques were used to train the dog in this case: The handler testified that he "would choose multiple vehicles and hide narcotics in some" and then



training programs may use “overt handler cueing”—such as “verbal commands” and “physical prompting”—to help teach dogs how to detect and alert to drugs, thereby making narcotics-detection dogs even more responsive to handler cueing. Lit, et al., 392.

Double-blind training and testing—where neither the dog nor the handler knows where the drugs have been hidden—can mitigate the handler-cueing problem. See Bird 424. Double-blind testing reduces the likelihood of cueing because “[if] the handler does not know the location of the controlled substance, it is less likely that the handler will exhibit any behavioral changes that could cue the dog.” Smith, *Going to the Dogs*, 46 Hous. L. Rev. 103, 129 (2009) (noting that “[t]raining methods can and should eliminate th[e] problem” of handler cueing). For this reason, double-blind testing is the gold standard for testing and certification of detection dogs. Indeed, the Scientific Working Group on Dog and Orthogonal Detector Guidelines, a coalition of local, state, and federal agencies working to establish best practices for detection dogs, submitted a report to the Department of Justice in 2010 emphasizing that training and certification programs should use double-blind testing. See Furton, et al., *The Scientific Working Group on Dog and Orthogonal Detector Guidelines* 12, 136 (2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/231952.pdf> (“SWGDOG Report”). But “few agencies undertake such rigorous testing.” Katz & Golembiewski, *Curbing the Dog*, 85 Neb. L. Rev. 735, 763-764 (2007).

---

“bring Aldo by” to locate the drugs that the handler had just hidden.

## 2. Detection of lawful substances

a. False alerts also arise because narcotics-detection dogs can, and often do, alert to the presence of substances other than the contraband they were purportedly trained to detect. This phenomenon, known as “generalization,” can occur because dogs frequently learn to identify narcotics by detecting the scent of a “contaminant or byproduct in the drug” whose odor is more easily perceived than that of the pure form of the drug itself. Lunney, *Has the Fourth Amendment Gone to the Dogs?*, 88 Or. L. Rev. 829, 838 (2009); see Johnston, *Canine Detection Capabilities* 3 (1990), available at [http://www.barksar.org/K-9\\_Detection\\_Capabilities.pdf](http://www.barksar.org/K-9_Detection_Capabilities.pdf) (generalization occurs when a dog senses an odor that generally matches the smell of contraband or a chemical associated with contraband, but is not the illegal substance the dog is purportedly trained to detect). Indeed, “studies with narcotics detector dogs have shown that dogs alert to volatile odor chemicals associated with drugs rather [than] the parent drug itself.” Lorenzo, et al., *Laboratory and Field Experiments Used to Identify Canis lupus var. familiaris Active Odor Signature Chemicals from Drugs, Explosives, and Humans*, 376 *Analytical & Bioanalytical Chemistry* 1212, 1213 (2003). Accordingly, dogs trained to detect drugs like cocaine, heroin, and ecstasy may also alert to a host of household items that contain the same “signature” odors, even when no illegal narcotics are present.

For example, field studies have shown that “drug detector dogs alert to the common volatile cocaine by-product methyl benzoate rather than to ... cocaine itself.” Furton, et al., *Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction—Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper*

*Currency*, 40 J. Chromatographic Sci. 147, 155 (2002). Methyl benzoate is “the dominant odor chemical signature for cocaine.” Macias, et al., *A Comparison of Real Versus Simulated Contraband VOCs for Reliable Detector Dog Training Utilizing SPME-GC-MS*, 40 Am. Lab. 16, 16 (2008). Although methyl benzoate is frequently found in street cocaine, it is not contraband. Indeed, the FDA has approved its use as a synthetic flavoring substance, and it can be found in a number of common household items, including perfume, solvents, and insecticide. Lunney 838-839.

Experiments have proven that methyl benzoate alone can prompt a narcotics-detection dog to alert, even when no cocaine or other contraband is present. Furton, et al., 153 tbl. IV; *see also id.* at 154-155 (dogs failed to alert to pharmaceutical-grade cocaine, which has minimal levels of methyl benzoate); Waggoner, et al., *Canine Olfactory Sensitivity to Cocaine Hydrochloride and Methyl Benzoate*, 2937 SPIE 216, 223 (1997). A detection dog appears to have alerted to methyl benzoate in a bottle of perfume in a student’s purse in *Horton ex rel. Horton v. Goose Creek Independent School District*, 690 F.2d 470, 474 (5th Cir. 1982).

Similarly, acetic acid, the “dominant odor compound in heroin samples,” may prompt dogs to alert to foods and prescription drugs. Macias, et al., 16. Acetic acid is the primary ingredient in vinegar; it is also present in pickles and some glues. Katz & Golembiewski 755. Prescription drugs can also give off the odor of acetic acid through the process of hydrolysis when exposed to air. *Id.*

Piperonal, the “dominant odor used by” detection dogs in alerting to the drug MDMA, also known as ec-

stasy, can also lead to false alerts. Lorenzo 1223. Piperonal is a “[f]lavouring agent in cherry and vanilla flavours” and is used in perfume and mosquito repellent. United Nations Office on Drugs and Crime, Regional Office for South Asia, *Precursor Control at a Glance* 19 (2006), available at [http://www.unodc.org/documents/southasia/reports/Precursor\\_Control\\_at\\_a\\_Glance.pdf](http://www.unodc.org/documents/southasia/reports/Precursor_Control_at_a_Glance.pdf). Experiments show that narcotics-detection dogs will readily alert to samples of piperonal that do not contain MDMA or other illegal narcotics. Lorenzo 1220 tbl. 3.

b. Flawed training and certification procedures may encourage dogs to engage in generalization, thereby contributing to false alerts in the field. As discussed above, when trained to detect drugs laced with contaminants or byproducts, dogs may learn to alert to a noncontraband byproduct or contaminant rather than to the drug itself, which can lead to false alerts. See *supra* pp. 16-18; see also Lunney 838 (“Studies show that drug-detection dogs alert not to the illegal drug itself, but instead to a contaminant or by-product in the drug.”); Sachs, *The Fake Smell of Death*, Discover, Mar. 1996, available at <http://discovermagazine.com/1996/mar/thefakesmellofde714/> (“[T]he truly difficult thing about training a dog to a scent is stimulus control.”). Thus, for instance, a trainer who trains a dog to detect cocaine using impure samples of “street” cocaine, which contains more adulterants than does pharmaceutical-grade cocaine, may actually be rewarding the dog for detecting the scent of methyl benzoate or another contaminant rather than the cocaine itself, thereby reinforcing behavior likely to lead to false alerts. See Katz & Golembiewski 756 (noting the increased risk of “false[] alert[s] to many legal products” if trainers “train drug dogs to alert to low levels of

methyl benzoate"); Sachs, *The Fake Smell of Death* ("A dog trained on street drugs can ... get distracted by cutting agents, homing in on baking powder in the fridge and ignoring uncut cocaine in the pantry.").<sup>11</sup>

Trainers can minimize the risk of generalization by using purer samples of narcotics to prevent narcotics-detection dogs from learning to alert to the contaminants or byproducts present in street drugs. See Lunney 837 n.31; Sachs, *The Fake Smell of Death*. Many training organizations, however, actively tout the fact that they use street drugs as samples during training exercises. Lunney 837 n.31. Trainers can also specifically train dogs to reduce alerts to legitimate substances through discrimination training, which "is used to train the dog to differentiate contraband from other items ... that the dog might inadvertently associate with what it is being trained to detect." *United States v. One Million, Thirty-Two Thousand, Nine Hundred Eighty Dollars in U.S. Currency* (\$1,032,980.00), 2012 WL 684757, at \*19 (N.D. Ohio Mar. 2, 2012). Such training, however, is not typical, and many major certifica-

---

<sup>11</sup> Similarly, trainers using impure samples may unwittingly train a dog to alert to other legal substances associated with contraband because a dog may incorrectly believe during training that it is being rewarded for identifying those noncontraband substances. Instead of alerting to the drug itself, dogs may alert "to the presence of some chemical molecule that they have come to associate with a reward." Myers, *In the Wake of Caballes, Should We Let Sniffing Dogs Lie?*, 20 Crim. Just. 4, 7 (Winter 2006). For example, a "dog might become fixated" on the smell of "Ziploc bags because the police stored drug training samples in them," increasing the risk of false alerts to the presence of drugs when, in fact, no contraband is present. Derr, *With Dog Detectives, Mistakes Can Happen*; see also Lunney 837 n.31.



tion organizations do not require dogs to distinguish between contraband and other associated odors.<sup>12</sup>

### 3. Residual odors

a. Narcotics-detection dogs also may give false alerts to “residual odors,” or odors that persist even though the contraband that created those odors is not present. Ensminger, *Police and Military Dogs* 133 (2012). Residual odors can occur even in locations that have never come into contact with contraband, because such odors are easily transmitted by contact from object to object and from person to person. See, e.g., Parmeter, et al., *Guide for the Selection of Drug Detectors for Law Enforcement Applications* 6 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/183260.pdf>. Thus, for example, “a person who has handled cocaine will transfer cocaine particles to anything else he ... touches, including skin, clothing, door handles, [and] furniture”—whether it belongs to him or not. *Id.* Accordingly, when a dog alerts to a residual odor on a car door handle, it could well be alerting to an odor that was transferred to the handle not by the driver, but rather by a friend, a valet, or a complete stranger. See

---

<sup>12</sup> See, e.g., National Narcotic Detector Dog Ass’n, *Narcotic Detection Standards* 2 (July 17, 2008), available at [http://www.nndda.org/official-docs/doc\\_view/2-narcotics-detection-standard?tmpl=component&format=raw](http://www.nndda.org/official-docs/doc_view/2-narcotics-detection-standard?tmpl=component&format=raw); National Police Canine Ass’n, *Standards for Training & Certification Manual* 6 (Dec. 27, 2011), available at <http://www.npca.net/Files/Standards/Standards.pdf>; United States Police Canine Ass’n, *Certification Rules and Regulations* 11-13, 16-17 (2012), available at <http://www.uspcak9.com/certification/USPCARulebook2012.pdf>; North American Police Work Dog Ass’n, *Bylaws and Certification Rules* 22 (June 19, 2011), available at <http://www.napwda.com/uploads/bylaws-cert-rules.pdf>.



Myers, 14 Geo. Mason L. Rev. at 4-5 (“[I]f the person being searched had attended a party where other people were using drugs,” a dog may alert “because of the residue on clothing or fabric.”). An alert to such an odor in the absence of actual contraband—however the odor was transferred—is, by definition, a false alert. *See infra* Part II.A.2.

b. As with the other causes of false alerts, flawed training methodologies can encourage false alerts to residual odors—or at a minimum, fail to prevent them. The odor concentrations at which a dog will alert depend in part on the quantities contained in the target samples used to train the dog. *See, e.g.,* Goldblatt, et al., *Olfaction and Explosives Detector Dogs*, in *Canine Ergonomics* 135, 161 (Helton ed., 2009) (explaining that training dogs to alert at very low concentrations can actually inhibit alerts to high concentrations). Handlers also influence the likelihood of false alerts by either rewarding or not rewarding dogs when they alert to residual odors. *See id.* at 159. Skilled trainers can, among other things, use “extinction training” to train dogs to ignore residual odors. *See, e.g., Commonwealth v. Ramos*, 894 N.E.2d 611, 613 (Mass. App. Ct. 2008). Dogs used by the U.S. Customs Service, for example, are trained not to alert to residual odors. Bird 414. But typical dog-training procedures do not train dogs to differentiate between residual odor and the odor of actual narcotics, and indeed some handlers actively train their dogs to alert to residual odors. *See, e.g., State v. Helzer*, 252 P.3d 288, 290 (Or. 2011); *see also supra* n.12 (citing certification standards).

## **II. UNDER A TOTALITY-OF-THE-CIRCUMSTANCES APPROACH, A VARIETY OF FACTORS ARE RELEVANT TO WHETHER A DOG ALERT CONSTITUTES PROBABLE CAUSE**

As illustrated above, a host of factors may cause even trained or certified narcotics-detection dogs to give false alerts—including the training or certification methodology itself—and dog-and-handler teams exhibit great variation in the accuracy of their alerts. Accordingly, mere evidence of training or certification, standing alone, cannot establish that a dog is sufficiently reliable for its alert to provide probable cause. Rather, an individualized assessment of a dog's reliability based on the totality of the circumstances is essential to the probable-cause determination.

### **A. A Number Of Different Factors Are Relevant To A Dog's Reliability**

Although under the totality-of-circumstances inquiry, courts should not apply a rigid checklist of factors in determining whether probable cause exists, several factors beyond the mere fact of training or certification are relevant to whether a narcotics-detection dog is sufficiently reliable: the rigorousness of the training or certification program; records of the dog's actual performance in the field, including its false-alert rate; and the training and experience of the dog's handler.

#### **1. Rigorousness of the training and certification program at issue**

Although dozens of canine training and certification organizations exist in the United States, no common set of regulatory or industry standards governs the conduct of training or certification programs. *See*

SWGDOG Report 9 (recognizing that courts are “increasingly” calling into question the reliability of detector dogs because of the “lack of common best practices for the certification and maintenance of detection teams”); Katz & Golembiewski 761-762.<sup>13</sup> As a result, “drug-detection dogs are generally trained and certified by private vendors without the benefit of [uniform] standards for training and certification,” leading such organizations to employ training standards and methodology that vary dramatically in quality and effectiveness. Lunney 835.<sup>14</sup>

Moreover, many organizations in the business of training and certifying dogs do not use rigorous training methods and certification standards designed to ensure that a dog will perform reliably in the field. Financial concerns may lead police forces employing nar-

---

<sup>13</sup> Indeed, although Florida requires certification for certain detection dogs used by law enforcement, Florida’s regulations expressly exclude narcotics-detection dogs from those requirements. See Fla. Admin. Code Ann. 11B-27.013(1)(a) (“[C]anines used by certified officers exclusively for tracking or specific detection ... are excluded from the certification process.”).

<sup>14</sup> For example, the accuracy rate a dog must attain for certification or successful completion of a training program varies widely depending on the organization. Some groups, like the United States Police Canine Association, require only a 70% accuracy rate to certify a narcotics-detection dog. Furton & Heller, *Advances In the Reliable Location of Forensic Specimens Through Research and Consensus*, 3 Canadian J. Police & Sec. Servs. 97, 102 (2005). Others, like the U.S. Customs Service, will not certify a dog unless it demonstrates a 100% accuracy rate. *Id.* And some certification organizations for narcotics-detection dogs simply certify dogs that “pass” their program, providing no parameters at all by which to assess certified dogs’ performance. Katz & Golembiewski 762.

cotics-detection dogs to use private organizations that offer less expensive alternatives—and possibly less rigorous training. Katz & Golembiewski 762 (“While some external, third-party certifications do exist that could meet the requirements of most scientific research demands, the absence of judicial concern for the certification process creates no incentives for canine units to undertake these expensive third-party certifications.”). And the increased demand for detection dogs in recent years has created even greater incentives for training and certifying organizations “to deploy dogs of marginal talent.” Myers, 14 Geo. Mason L. Rev. at 28. Moreover, where local budget pressures are particularly great, some police forces have been forced to undertake their own training of narcotics-detection dogs, see Budd, *Lack of Training Can Come Back to Bite Police K-9 Units*, Dayton Daily News, May 23, 2011, at A4, raising concerns regarding training quality as well as potential conflicts of interest, especially if the standards and methods employed are never subject to scrutiny, see Katz & Golembiewski 762 (“The ability to teach even the ‘amateur’ to train a ‘certified’ dog speaks volumes with regard[] to the limited training actually performed by dog trainers. Of even greater concern is that the entrepreneur has concluded that courts will not question his do-it-yourself training methods.”).

Accordingly, testimony that a dog is “trained” or “certified,” standing alone, is virtually meaningless without evidence of what the training and certification entailed—and in particular evidence that permits assessment of whether the training or certification methodology exacerbates false alerts rather than prevents them. See Myers, 14 Geo. Mason L. Rev. at 27 (“[I]n practice there are many competing standards. ... There is very little oversight of what it means to be certi-

fied.”); Weiner, *Canines and the Constitution*, 23 Florida Defender 41, 47 (Winter 2011) (“Dog certification programs vary tremendously in their methods, elements, and tolerances of failure.”).

## 2. Records of a dog’s actual performance in the field

a. Crucial to determining whether a particular narcotics-detection dog is reliable is the dog’s actual performance in the field after training or certification is complete—including the number of false alerts it has given. Canine experts agree that “excessive emphasis is often placed on how detector dogs have been trained rather than how [dog-and-handler] teams perform.” Furton & Heller, *Advances In the Reliable Location of Forensic Specimens Through Research and Consensus*, 3 Canadian J. Police & Sec. Servs. 97, 100 (2005); see SWGDOG Report 139 (“Training records do not necessarily reflect reliability of the team.”). “Ultimately, the final performance of the detection team is more important than the specifics of the breed, training, alert and rewards systems, etc.” Furton & Heller 100; see also SWGDOG Report 12.

Because field-performance records provide invaluable insight into a dog’s reliability, SWGDOG has recommended that police departments and other organizations using narcotics-detection dogs keep such documentation, which should include information such as the date and location of a seizure, the length of a search, the description of the canine’s activity, the type of substance that was seized, if any, and any false alerts. See SWGDOG Report 137-139. Such records are crucial in assessing a dog’s reliability because



the only way to tell if [a] particular dog has slipped over to the “dark side” [i.e., is unreliable] is to scrupulously maintain records showing how often the dog alerts and under what circumstances, and make that information available to judges when they are determining if the specific event constitutes probable cause. If records were properly kept, they would offer insights into whether these dogs, as they operate in the real world, have biases or reflect their handlers’ biases.

Myers, *In the Wake of Caballes, Should We Let Sniffing Dogs Lie?*, 20 Crim. Just. 4, 9 (Winter 2006).

b. There is no merit to the contentions of the State (at 25-29) and the United States (at 16-21) that evidence of a dog’s actual performance in detecting drugs in the field is irrelevant to the probable-cause analysis.

*First*, the State and the United States argue that results of training activities in controlled environments are the only accurate indicators of a dog’s reliability. But a dog’s performance in a controlled testing environment provides an incomplete picture of how that dog will actually perform in the field—and thus an incomplete picture of whether that dog is a reliable detector of drugs *in a real-world setting*, which is the heart of the probable-cause inquiry.

Indeed, because “dogs ... do different things in the field than they do in the controlled environment of a training facility,” training and certification programs will produce skewed results if they use only controlled, indoor settings where many barriers to accurate detection are not present. Myers, 20 Crim. Just. at 7; *see United States v. Florez*, 871 F. Supp. 1411, 1421



(D.N.M. 1994) (“[T]he controlled setting of training centers ... where narcotics dogs are certified is quite different from actual work in the field.”). As an initial matter, reliably distinguishing between contraband and noncontraband substances may be more challenging in the field than in a controlled training environment because of the presence of additional external stimuli. For example, marijuana contains chemical components similar to those present in fir and juniper trees; accordingly, it may be difficult for a dog in the field to distinguish between marijuana and those legal substances present in the environment. See Katz & Golembiewski 756.

Similar problems can also arise because, in an uncontrolled environment, “vapor compounds from target odors are unavoidably mixed with other compounds present in the ambient air,” challenges to detection that are not present in controlled situations. Johnston 2; see also *id.* (“training under field conditions” improves dogs’ ability to discriminate between target odors and non-target odors). Empirical study has shown that higher levels of extraneous odors in the environment can have a “pronounced effect on detection performance,” resulting in “increasing proportions of false alarms.” Waggoner, et al., *Effects of Extraneous Odors on Canine Detection*, 3575 SPIE 355, 359 (1998). Indeed, the false-alert rate of most of the dogs studied increased by several times—for one dog, from less than 10% to almost 60%—as the concentration of an extraneous odor increased. *Id.* at 360 fig. 3. Encountering extraneous environmental odors can therefore cause dogs to exhibit significantly higher rates of false alerts in the real world than they do in controlled test settings.

In addition, “environmental factors” not present in a controlled setting can “influence the performance of [a] dog” in the field. Mesloh, et al., *Scent as Forensic Evidence and Its Relationship to the Law Enforcement Canine*, 52 J. Forensic Identification 169, 178 (2002); see also Florez, 871 F. Supp. at 1421 (“variable factors such as weather conditions ... may affect the dog[']s reliability and may not have been present at the time the dog was certified”). For that reason, a dog may have a lower false-positive rate in a controlled testing situation than in a real-world setting, which includes everyday environmental impediments to a dog’s accuracy, such as wind, rain, snow, and heat. See Bird 413; see also Derr, *With Dog Detectives, Mistakes Can Happen*, N.Y. Times, Dec. 24, 2002, at F3.

*Second*, the State (at 30-31) and the United States (at 17-21) erroneously assume that alerts in the field that do not lead to the discovery of narcotics are not false alerts because they are likely to be alerts to residual odors.

As an initial matter, attributing false alerts to residual odors is, in the end, merely speculation, a proposition neither the State nor the United States disputes. See Pet. Br. 6 (contending that it is impossible to determine the accuracy of alerts when contraband is not found because “it is possible ... that the dog has alerted to the residual odor of contraband recently in the vehicle or on the presence of someone using the vehicle”); U.S. Br. 18 (“[W]hen a dog alerts in the field but no drugs are found, it is typically not possible to definitively determine [the cause].”). In most cases, the only certainty is that the dog’s alert did not lead to the discovery of contraband; there is no evidence that the false alert was prompted by residual odors rather than one of the other causes discussed above, or some other

cause altogether. *See, e.g.,* Myers, 14 Geo. Mason L. Rev. at 22 (typically, there is “no objective evidence on which to base” a conclusion that a particular false alert was prompted by a residual odor). Law-enforcement officials have an obvious incentive to attribute errors to whatever cause they deem least offensive to their dogs’ reliability, but courts should not accept such speculation as fact, let alone rely on it to find a dog reliable when the dog’s alerts do not lead to the discovery of actual narcotics.

More fundamentally, the assertion that alerts to residual odors are “correct” for probable-cause purposes entirely misunderstands the nature of the probable-cause inquiry. Probable cause “looks to whether evidence will be found *when the search is conducted*,” *Grubbs*, 547 U.S. at 95, not whether contraband may formerly have been present in a particular location. For this reason, this Court has recognized that a showing of probable cause can grow “stale” if it no longer establishes a sufficient probability that the items sought are *currently* present, even if that showing establishes that the items were present at some earlier time. *See id.* at 95 n.2; *Sgro v. United States*, 287 U.S. 206, 210-211 (1932); *see also, e.g., United States v. Wagner*, 989 F.2d 69, 75 (2d Cir. 1993). Accordingly, when police seek to establish probable cause based on a dog alert, courts must inquire into the likelihood that the police will actually locate the drugs sought *during the search*. A history of alerts to residual odors, when those alerts do not result in drugs being found, therefore weighs *against* a finding of probable cause, rather than in favor of it.

### 3. Experience and training of the dog's handler

Equally important in determining a narcotics-detection dog's reliability is the experience and training of the handler who must interpret the dog's signals and make the ultimate decision regarding the meaning of those signals. See Bird 425 (emphasizing that "[t]he judiciary's sole focus on reliability of the dog is misplaced"). Such a consideration is crucial because the "olfactory ability of the dog has little relevance if the handler cannot properly interpret the alert of the dog." Mesloh, et al., 178; see also Hinkel & Mahr, *Drug Dogs Often Wrong* (according to a trainer, "[t]he dogs are only as good as the handlers"); Katz & Golembiewski 762 ("Handler error affects the accuracy of a dog. The relationship between a dog and its handler is the most important element in dog sniffing[.]").

Because each dog may have a unique way of alerting to contraband, handlers should participate in comprehensive training programs to learn how to interpret that particular dog's responses and its other behavior patterns. Bird 423. The length of time a handler has worked with a particular narcotics-detection dog is thus highly relevant to the dog's reliability. Ideally, a dog will work with only one handler for the duration of its career so the handler can become carefully attuned to interpreting the dog's signals. *Id.* at 423-424; see Handwerk, "Detector Dogs" Sniff Out Smugglers for U.S. Customs, Nat'l Geographic News, July 12, 2002, available at [http://news.nationalgeographic.com/news/2002/07/0712\\_020712\\_drugdogs.html](http://news.nationalgeographic.com/news/2002/07/0712_020712_drugdogs.html). In reality, however, dogs do not always consistently work with the same handler; indeed, in this case, when he alerted to respondent's car, the detection dog was not working with the handler with whom he had trained. JA53-54.

**B. Conducting A Totality-Of-The-Circumstances Inquiry Into A Dog's Reliability Is Not Unduly Burdensome**

A totality-of-the-circumstances inquiry into a dog's reliability is not, as the State and the United States contend, unduly burdensome. In fact, this Court's precedent has long required fact-intensive "assessment[s] of probabilities in particular factual contexts," *Gates*, 462 U.S. at 232, "with account taken of all the circumstances," *Brinegar*, 338 U.S. at 176, and lower courts conduct such inquiries as a matter of course. In such cases it is the government's duty to present "[s]ufficient information ... to allow [the court] to determine probable cause; [the court's] action cannot be a mere ratification of the bare conclusions of others." *Gates*, 462 U.S. at 239.

For example, to establish the reliability of an informant, police officers often testify to the number of tips they have received from the informant, the number that turned out to be correct, and even the names of those convicted as a result. *See, e.g., McCray v. Illinois*, 386 U.S. 300, 303 (1967); *see also, e.g., United States v. Koerth*, 312 F.3d 862, 867 (7th Cir. 2002) (giving no weight to characterization of informant as reliable where police "fail[ed] to explain the extent, if any, that [the informant] has previously provided information leading to arrests or prosecutions for criminal activity"); *United States v. Foree*, 43 F.3d 1572, 1575 (11th Cir. 1995) (explaining that mere "averment that the [informant] has provided reliable information in the past" provides no basis for judging reliability, absent specific information as to previous tips and "whether



the information resulted in any search, arrest, or conviction").<sup>15</sup>

Moreover, there is nothing unusual or excessively burdensome in inquiring into evidence relevant to a dog's reliability. In particular, contrary to the State's arguments (at 33), considering field-performance records in a totality-of-the-circumstances analysis would pose only minimal burdens on local police. Indeed, many police departments across the country already maintain such documentation. *See, e.g.,* Balona, *Courts Raise Drug-Dog Questions*, Daytona Beach News-Journal, May 9, 2011, at 1A; Bradford, *Actions by Drug Dogs Key in Arrests*, Ark. Democrat-Gazette, May 3, 2004; Bird 425 ("A dog's accuracy rate in detecting narcotics is one of the most easily obtained indicators of reliability. Handlers commonly record their performance, and this data is readily presentable in a courtroom." (footnote omitted)).

In addition, many courts already "consider the canine's history of success when reliability is challenged," with "law enforcement frequently provid[ing] data on

---

<sup>15</sup> There is no merit to the contention that a dog's alert, unlike an informant's tip, should be exempt from any assessment of its reliability. Contrary to the State's assertion (at 27), it is irrelevant that dogs, unlike some informants, "lack the ... incentive to lie or twist the truth for ulterior objectives." The probable-cause inquiry does not turn on subjective motivations, but on the likelihood that evidence of a crime will be found. *See Grubbs*, 547 U.S. at 95. And although the United States contends that a dog's alert is "inherently more reliable than an informant's tip" because dogs "detect only the presence or absence of narcotics," U.S. Br. 22 (internal quotation marks omitted), the empirical evidence shows that dogs often alert when contraband is not present, *see supra* Part I.B.



the canine's success history as a standard method of establishing reliability." Minzner, *Putting Probability Back into Probable Cause*, 87 Tex. L. Rev. 913, 949 (2009); see, e.g., *United States v. Limares*, 269 F.3d 794, 797-798 (7th Cir. 2001); *United States v. Diaz*, 25 F.3d 392, 395-396 (6th Cir. 1994); *United States v. Lingenfelter*, 997 F.2d 632, 639 (9th Cir. 1993); *Florez*, 871 F. Supp. at 1420; *State v. England*, 19 S.W.3d 762, 768 (Tenn. 2000) ("[I]n making the reliability determination," the trial court "may consider such factors as ... the canine's 'track record,' with emphasis on the amount of false negatives and false positives the dog has furnished."); *State v. Nguyen*, 726 N.W.2d 871, 877 (S.D. 2007) ("[T]rial courts making drug dog reliability determinations may consider a variety of elements, including such matters as the dog's ... successes and failures in the field.").

In short, engaging in the necessary totality-of-the-circumstances analysis is no more burdensome in the dog-sniff context than in any other. And artificially limiting the inquiry to the question whether the dog is "trained" or "certified"—as the State and the United States advocate—will seriously hinder courts in making the accurate assessments of probable cause on which Fourth Amendment protections depend. By barring courts from inquiring into the nature of a dog's and its handler's training or a dog's reliability in the field, the State's rule will also encourage cheaper and laxer training methods and promote handler cueing, thus worsening the problems that already exist. Turning the probable-cause inquiry into a formality with a foregone conclusion may well make life easier for the government, but this Court has never yet permitted such a shortcut. It should not do so now.

# CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

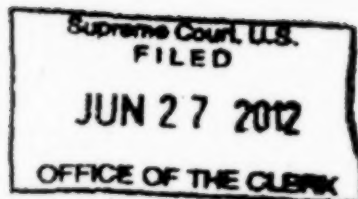
JONATHAN D. HACKER  
CO-CHAIR, SUPREME COURT  
AMICUS COMMITTEE  
NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS  
1625 Eye Street, N.W.  
Washington, D.C. 20006  
  
MASON C. CLUTTER  
NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS  
1660 L Street, N.W., 12th Floor  
Washington, D.C. 20036

DANIELLE SPINELLI  
*Counsel of Record*  
ANNIE L. OWENS  
MADHU CHUGH  
WEILI J. SHAW  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
(202) 663-6000  
danielle.spinelli@wilmerhale.com

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

AUGUST 2012

**AMICUS  
CURIAE  
BRIEF**



---

In The  
Supreme Court of the United States

---

STATE OF FLORIDA,  
*Petitioner,*

v.

CLAYTON HARRIS,  
*Respondent.*

---

On Writ of Certiorari to the  
Supreme Court of Florida

---

**BRIEF OF THE NATIONAL POLICE CANINE  
ASSOCIATION AND POLICE K-9 MAGAZINE  
AS AMICI CURIAE IN SUPPORT OF  
PETITIONER**

---

Arthur T. Daus III  
2417 N.E. 22<sup>nd</sup> Terrace  
Fort Lauderdale, Florida 33305  
[Tel.] (954) 242-5584  
Ted.Daus@PoliceK-9Magazine.com  
Counsel for *Amici Curiae*

## TABLE OF CONTENTS

|                                                                                                                                                                                                                                  | PAGE     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| Table of Authorities.....                                                                                                                                                                                                        | ii       |
| Interest of Amici Curiae .....                                                                                                                                                                                                   | 1        |
| Summary of the Argument.....                                                                                                                                                                                                     | 2        |
| Argument.....                                                                                                                                                                                                                    | 4        |
| <b>THE STATE CAN MAKE A PRIMA FACIE<br/>SHOWING OF PROBABLE CAUSE FOR A<br/>SEARCH BASED ON A NARCOTICS<br/>DETECTION DOG'S ALERT BY<br/>DEMONSTRATING THAT THE DOG HAS<br/>BEEN PROPERLY TRAINED AND/ OR<br/>CERTIFIED.....</b> | <b>4</b> |
| State Authority.....                                                                                                                                                                                                             | 4        |
| Federal Authority.....                                                                                                                                                                                                           | 13       |
| Conclusion.....                                                                                                                                                                                                                  | 20       |
| Appendix.....                                                                                                                                                                                                                    | 21       |

| Table of Authorities                                                        | Page(s)       |
|-----------------------------------------------------------------------------|---------------|
| <i>Coleman v. State</i> ,<br>911 So. 2d 259 (Fla. Dist. Ct. App. 2005)..... | 3,4,5,6       |
| <i>Brinegar v. Unites States</i> ,<br>338 U.S. 366 (2003).....              | 11            |
| <i>Dawson v. State</i> ,<br>518 S.E.2d 477 (Ga. Ct. App. 1999).....         | 5             |
| <i>Debruler v. Commonwealth</i> ,<br>231 S.W.3d 753 (Ky. 2007).....         | 8,9           |
| <i>Evans v. City of Aberdeen</i> ,<br>926 So.2d 181 (Miss. 2006).....       | 12            |
| <i>Harris v. State</i> ,<br>71 So.3d 756 (Fla. 2011).....                   | <i>passim</i> |
| <i>Harris v. State</i> ,<br>989 So. 2d 1214 (Fla. Dist. Ct. App. 2008)..... | 3,4           |
| <i>Illinois v. Caballes</i> ,<br>543 U.S. 405 (2005).....                   | <i>passim</i> |
| <i>Indianapolis v. Edmond</i> ,<br>531 U.S. 405 (2005).....                 | <i>passim</i> |
| <i>Joe v. State</i> ,<br>73 So.3d 791 (Fla. Dist. Ct. App. 2011).....       | 10            |
| <i>Matheson v. State</i> ,<br>870 So. 2d 8 (Fla. Dist. Ct. App. 2003).....  | 5             |



|                                                                                  |       |
|----------------------------------------------------------------------------------|-------|
| <i>Maryland v. Pringle</i> ,<br>540 U.S. 366, 371 (2003).....                    | 11    |
| <i>New York vs. Belton</i> ,<br>453 U.S. 950 (1981).....                         | 17    |
| <i>Ohio v. Simmons</i> ,<br>2011 WL 6179577 (Ohio App. 11 Dist.).....            | 7,8   |
| <i>State v. Laveroni</i> ,<br>910 So. 2d 333 (Fla. Dist. Ct. App. 2005)...       | 3,4,5 |
| <i>State v. Lopez</i> ,<br>850 N.E.2d 781 (Ohio App. 2006).....                  | 6     |
| <i>State v. Nguyen</i> ,<br>726 N.W.2d 871 (S.D. 2007).....                      | 9     |
| <i>State v. Nguyen</i> ,<br>811 N.E.2d 1180 (Ohio App. 6 Dist.,2004).....        | 7,8   |
| <i>State v. Yeoumans</i> ,<br>172 P.3d 1146 (Idaho App. 2007).....               | 12    |
| <i>United States v. Allen</i> ,<br>159 F.3d 832, (4th Cir. 1998).....            | 15    |
| <i>United States v. Age</i> ,<br>Slip Copy, 2011 WL 4495307 C.A.4 (Md.2011) ...  | 15    |
| <i>United States v. Berry</i> ,<br>90 F.3d 148 (6 <sup>th</sup> Cir. 1996).....  | 16    |
| <i>United States v. Boxley</i> ,<br>373 F.3d 759 (6 <sup>th</sup> Cir.2004)..... | 13    |

|                                                                                                                         |               |
|-------------------------------------------------------------------------------------------------------------------------|---------------|
| <i>United States v. Hill</i> ,<br>195 F.3d 258 (6 <sup>th</sup> Cir. 1980).....                                         | 14            |
| <i>United States v. Klein</i> ,<br>626 F.2d 22 (7 <sup>th</sup> Cir. 1980).....                                         | 15            |
| <i>United States v. Lopez</i> ,<br>380 F.3d 538 (1 <sup>st</sup> Cir. 2004).....                                        | 13            |
| <i>United States v. Olivera-Mendez</i> ,<br>484 F.3d 505 (8 <sup>th</sup> Cir. 2007).....                               | 15            |
| <i>United States v. Outlaw</i> ,<br>319 F.3d 701 (5 <sup>th</sup> Cir. 2003).....                                       | 14            |
| <i>United States v. Place</i> ,<br>462 U.S. 696 (1983).....                                                             | <i>passim</i> |
| <i>United States v. Robinson</i> ,<br>390 F.3d 853 (6 <sup>th</sup> Cir. 2004).....                                     | 13            |
| <i>United States vs. Sharpe</i> ,<br>470 U.S. 675 (1985).....                                                           | 16,17         |
| <i>United States v. Sundby</i> ,<br>186 F.3d 873 (8 <sup>th</sup> Cir. 1999).....                                       | 14            |
| <i>U.S. v. \$1,032,980.00 in U.S. Currency</i> ,<br>--- F.Supp.2d ---, 2012 WL 684757<br>(N.D. Ohio March 2, 2012)..... | 14            |
| <i>Wiggs v. State</i> ,<br>72 So. 3d 154, 161<br>(Fla. Dist. Ct. App. 2011).....                                        | 10            |

## INTEREST OF AMICI CURIAE<sup>1</sup>

Police canine handlers across the United States have an ardent interest in combating illegal narcotics. Drug detection dogs perform a crucial service for law enforcement related to these efforts. Police K-9 Magazine is a national publication with a 20,000 canine handler readership that covers every state in the union. Most of these law enforcement officers are canine handlers that have a vested interest in the issue before the court. The National Police Canine Association is an association that governs, sets standards and certifies police work dogs for their membership. Upon passing their independent certification, police dogs are certified that they are well trained and have the unique ability to locate the source of existing narcotic odor. The National Police Canine Association is headquartered out of Arizona. The amici have a substantial interest in this Court's determination of whether the Florida Supreme Court has decided an important federal question in a way that conflicts with the established Fourth Amendment precedent of this Court by holding that an alert by a well-trained narcotics detection dog certified, to detect the odor of illegal contraband, is insufficient to establish probable cause for the search of a vehicle. The Magazine and all law enforcement officers and canine handlers in all fifty states, along with the National Police Canine Association, have a distinct interest in the correct disposition of this matter.

<sup>1</sup> Pursuant to Supreme Court Rule 37, Consent was granted by both the Petitioner and the Respondent. The amici's motion to participate in this cause was granted at the petition phase. This brief was authored by counsel for the amici and funded by the amici.

## SUMMARY OF THE ARGUMENT

The amici advances two main arguments to this Honorable Court. First, that a well trained narcotics dog is entitled to a presumption of probable cause when it alerts to the exterior of an automobile indicating only the presence of illegal narcotic odor in the automobile to be searched, and that a statistical analysis, focusing merely on the field performance records (as the Florida Supreme Court did in Harris) is improper because of the uncontrolled setting in which the alert takes place. The controlled environment that training provides is the most accurate assessment of a dog's ability to detect illegal drug odor because the atmosphere allows for a definitive measurement of whether the dog was right or wrong because the setting is controlled. The amici contends that the training records, and only the training records, should be analyzed in determining the narcotics dog reliability because the dog is evaluated in a controlled setting (unlike the field performance records which have unknown variables) thus enabling the trial court to fairly and accurately assess the dogs reliability based upon it's performance in the controlled setting. This style of information may only be obtained from an evaluation of the training records and/or certification's controlled environment.

In the alternative, the State can make a prima facie showing of probable cause for a warrantless search based on a narcotic dog's alert by establishing that the dog has been properly trained and independently certified. After the state meets its initial burden, the dog's reliability can then be contested by the defendant utilizing the performance records of the dog, training records of the dog or the presentation of other evidence, such as expert testimony.

An alert by a well trained and/or certified narcotics detection dog, standing alone, provides an officer with probable cause to search and consequently, this Court should reverse the decision of the Florida Supreme Court in their decision *Harris v. State*, 71 So. 3d 756 (Fla. 2011) discussing that such an alert only provides 'mere suspicion' of criminal activity. Thereby approve of the First District Court of Appeal's decision in *Harris v. State*, 989 So. 2d 1214 (Fla. Dist. Ct. App. 2008), and in doing so, approve the holdings of two others Florida District Courts of Appeal in *State v. Coleman*, 911 So. 2d 259, (Fla.. Dist. Ct. App. 2005), and *State v. Laveroni*, 910 So. 2d 333 (Fla. Dist. Ct. App. 2005) and bring the State of Florida in line with the vast majority of the courts and jurisdictions across the country that properly follow this court's precedent of *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *United States v. Place*, 462 U.S. 696 (1983).

## ARGUMENT

**THE STATE CAN MAKE A PRIMA FACIE SHOWING OF PROBABLE CAUSE FOR A SEARCH BASED ON A NARCOTICS DETECTION DOG'S ALERT BY DEMONSTRATING THAT THE DOG HAS BEEN PROPERLY TRAINED AND/ OR CERTIFIED.**

### STATE AUTHORITY

The First District Court of Appeal of Florida (hereinafter "1st D.C.A.") decided *Harris* relying on The Fifth District Court of Appeal's of Florida (hereinafter "5th D.C.A.") decision in *State v. Coleman*, 911 So.2d 259 (Fla. 5th D.C.A. 2005) and The Fourth District Court of Appeal's of Florida (hereinafter "4th D.C.A.") decision in *State v. Laveroni*, 910 So.2d 333 (Fla. 4th D.C.A. 2005) that the state can make a *Prima Facie* showing, of a narcotics dog reliability, by demonstrating that the dog has been properly trained and certified. Thereby, the three intermediate appellate courts of Florida have aligned themselves with this Honorable Court's established precedent in *Illinois v. Caballes*, 543 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983) by holding that the state make a prima facie showing of a narcotics dog's reliability by establishing that the canine has been properly trained.



For example, the Fourth District Court of Appeal wrote in *Laveroni*, "Our review of cases from around the country indicates that *Matheson*, [*Harris* is based upon *Matheson*] which held that the state must establish the reliability of the dog through performance records in order to show probable cause, is out of the mainstream." (Emphasis added) The 4<sup>th</sup> D.C.A. extensively researched the issue that is before the Court, relying on both State and Federal authority.

The Court of Appeals in and for the State of Georgia in *Dawson v. State*, 518 S.E. 2d 477 (Ga. Ct. App. 1999) on this specific issue held that evidence of certification as a narcotics detection dog constitutes prima facie evidence of reliability but that this presumption can be rebutted by the defendant with proof of the failure rate of the dog or through other evidence the defendant wished to present, with the final determination to be made by the trial court. The 4<sup>th</sup> D.C.A., in relying on *Dawson* and rejecting the *Harris* style of reasoning of the Florida Supreme Court, aligned itself with the mainstream legal philosophy embraced by most courts in the country.

The 5<sup>th</sup> D.C.A. found itself in a unique position in resolving this issue in their opinion *State v. Coleman*, 911 So.2d 259 (Fla. 5<sup>th</sup> D.C.A. 2005). The 5<sup>th</sup> D.C.A. rejected the *Harris* style of

reasoning of the Florida Supreme Court as flawed and united itself with the 4<sup>th</sup> D.C.A. and the rest of the country in finding: "Having reviewed both decisions and the authorities upon which they rely, we align ourselves with the Fourth District Court and conclude: [T]hat the state can make a prima facie showing of probable cause based on a narcotic dog's alert by demonstrating that the dog has been properly trained and certified. If the defendant wishes to challenge the reliability of the dog, he can do so by using the performance records of the dog, or other evidence, such as expert testimony.... Whether probable cause has been established will then be resolved by the trial court." *Coleman at 261*. Thereby, aligning themselves with the legal precedent of this Honorable Court decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *United States v. Place*, 462 U.S. 696 (1983).

State courts across the country have ruled on this issue following the authority of the United States Supreme Court. In *State v. Lopez*, 166 Ohio App.3d 337, 850 N.E. 2d 781 (2006) the Ohio Court of Appeals held that "...the majority hold that the state can establish reliability by presenting evidence of the dog's training and certification, which can be testimonial or documentary. Once the state establishes reliability, the defendant can attack the dog's "credibility" by evidence relating to training

procedures, certification standards, and real-world reliability". Thus aligning themselves with the legal precedent of this Honorable Court decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *United States v. Place*, 462 U.S. 696 (1983).

Ohio Courts have continued to dismiss defense arguments that the state cannot establish probable cause for a search by introducing evidence that the dog was trained and certified. The Ohio Court of Appeals, as recently as December 12, 2011, held that *United States v. Place*, 462 U.S. 696, (1983) (holding a K-9 sniff by a "well-trained narcotics-detection dog" as "*sui generis*" because it "discloses only the presence or absence of narcotics, a contraband item"). *Ohio v. Simmons*, 2011 WL 6179577 (Ohio App. 11 Dist.) "[O]nce a well-trained dog alerts to the odor of drugs from a lawfully detained vehicle, an officer has probable cause to search the vehicle for contraband." "Ample evidence related to Rebel's training and certification was presented during the suppression hearing to establish that he is a 'well-trained narcotics dog' under *Place*, supra. ...Based on that information, we presume that Rebel is a reliable narcotics dog, and Mr. Simmons failed to put on any evidence to the contrary." *Simmons*, supra. *State v. Nguyen*, 157 Ohio App.3d 482, 2004-Ohio-2879, engaged in a substantial survey of federal and state law related to the matter of

establishing K-9 reliability and the evidence required. The *Nguyen* court recognized that the national trend stated “that a drug dog’s training and certification records can be used to uphold a finding of probable cause to search and can be used to show reliability, if required, but canine reliability does not always need to be shown by real world records.” *Id.* at 46. In conclusion, the Sixth District held that “proof of the fact that a drug dog is properly trained and certified is the only evidence material to a determination that a particular dog is reliable.” *Simmons*, *supra*.

The Supreme Court of the Commonwealth of Kentucky, in a dog tracking case (a dog that smells and follows human scent), held in *Debruler v. Commonwealth*, 231 S.W.3d 752 (Ky.2007) that the Commonwealth provided sufficient foundation for admission at trial of the dog’s tracking ability. As to the issue of the dog’s training and qualifications, the Kentucky Supreme Court found “...Officers Howard and Morgan provided evidence that the dogs had been trained at an Indiana dog-training facility. According to Officer Howard’s testimony about Denise [the 1<sup>st</sup> dog], she had been certified in tracking by the Owensboro Police Department and is recertified every year following thirty-two hours of additional training. Furthermore, she completes practice runs every week. Officer Morgan testified that Bady [the 2<sup>nd</sup> dog] has been certified by the United States Police Canine Association and

competes twice a year to maintain this certification. Like Bady, she completes practice runs on a weekly basis". *Debruler at 758*.

The amici notes in the rationale above, that if evidence of a dog's unique olfactory ability meets the admissibility standard at trial by the officer's testimony related to training and certification, then certainly it should be sufficient to establish a *prima facie* presumption of reliability at a motion to suppress which may be rebutted by the defense.

The Supreme Court of South Dakota tackled a similar issue in their decision *State v. Nguyen*, 726 N.W.2d 871 (S.D. 2007). The Supreme Court of South Dakota held that a drug detection canine was deemed reliable based upon the presentation of its certification and training. The South Dakota Supreme Court was aware of and rejected the *Harris* rationale used by the Florida Supreme Court as flawed. Through this finding, once again a state court aligned themselves with the legal precedent of this Honorable Court decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 32 (2000) *United States v. Place*, 462 U.S. 696 (1983).

Because of the Florida Supreme Court's *Harris* decision, Florida District Courts of Appeal are now **not** following this Court's decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005) and *United States*



*v. Place*, 462 U.S. 696 (1983) which held that a well-trained narcotics dog provides probable cause to search. They are instead are now applying a more arduous and cumbersome standard: ..."[T]he State must present the training and certification records, an explanation of the meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer..." *Joe v. State*, 73 So.3d 791 (Fla. 5<sup>th</sup> DCA 2011). The slippery *Harris* slope continues in the Florida District Courts of Appeal most recently writing: "Thus, in *Harris*, the court is requiring that law enforcement train dogs to distinguish between the odor of minute quantities of drugs and larger quantities of drugs. If that cannot be done for a particular drug, it seems we will need to abandon dogs as a method of obtaining probable cause for that drug." *Wiggs v. State*, 72 So. 3d 154, 161 (Fla. Dist. Ct. App. 2011)(Altenbernd J., specially concurring). This style of analysis has resulted into a convoluted statistical review of only the field performance records focusing on the various ways to formulate statistic or percentages based upon the dog alerts with subsequent searches producing tangible drugs being found versus alerts with subsequent searches producing no tangible drugs being found.



The Florida Supreme Court's indication that it did not have the "benefit of quantifying" the narcotic canine's success rate in the field shows the court's misconception regarding narcotics odor and the true inaccuracy of field performance records in determining a dog's reliability and a proper probable cause analysis. *Harris*, 71 So. 3d at 773. "The probable cause standard is incapable of precise definition or quantification into percentages." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) citing *Brinegar v. United States*, 338 U.S. 366 (2003).

At this point the amici are compelled to point out that many courts across the country, both state and federal, have attempted to label narcotics odor in order to legally examine the topic of drug odor. Descriptive adjectives such as residual, lingering, or stale have all been applied in order to attempt to reach a well reasoned legal opinion. But simply put, to a well-trained narcotics dog, odor is odor. It either exists or it does not. The dog can not communicate the strength of the odor uncovered. Odor is able to be detected by a dog's unique strong olfactory sense to be located in a certain location and sitting (the alert) or it is not. The well-trained drug dog does not have the ability to lift its right leg if the odor is strong or lift its left leg if the odor is weak but the odor of an illegal substance is present under each of the above scenarios. It is the **presence of the odor** of an illegal substance which is the basis

for the legal probability that real tangible drugs are present or were recently present.

In 2005, the Mississippi State Supreme Court tackled this very same issue as it relates to drug odor and money in *Evans v. City of Aberdeen*, 926 So.2d 181 (Miss. 2006). It refused to adopt the theory that all money was contaminated and practically discredited it. Relying on scientific studies, the Court explained that the answer lies with methyl benzoate, a bi-product of cocaine. Narcotic dogs are not trained to detect cocaine itself, but the smell of methyl benzoate. They will alert only when the levels of methyl benzoate, thus cocaine, are substantial. Methyl benzoate is also extremely volatile and **evaporates very quickly**. Currency in general population, although tainted for the most part, will not trigger an alert. It was scientifically established to the satisfaction of the Mississippi Supreme court that only currency which was very **recently** in contact with significant amounts of cocaine can be detected by a narcotic trained dog. *Evans v. City of Aberdeen, supra*. Since, the odor of illegal drugs (like cocaine) evaporate very quickly, only current odor from actual drugs present or from drugs that were recently present can be detected by the dog, hence, probable cause.

The Court of Appeals of Idaho in *State v. Yeoumans*, 172 P.3d 1146 (Ct.App.2007) The Idaho court noted the isolated legal *Harris* rationale used by the Florida Supreme Court as

flawed. The court also rejected the argument that the information communicated by the dog's alert could not support a finding of probable cause because it was "stale." The Court said that " 'there is no arbitrary time limit on how old information [supporting probable cause] can be.' ... Rather, the test for staleness is whether the available information justifies a conclusion that contraband is **probably** on the person or premises to be searched." In so doing, once again a state court, aligned themselves with the legal precedent of this Honorable Court decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 32 (2000) *United States v. Place*, 462 U.S. 696 (1983).

#### FEDERAL AUTHORITY

Federal Courts have repeatedly held that appropriate certification by an organization is sufficient to show reliability of a dog. See *United States v. Robinson*, 390 F.3d 853 (6th Cir. 2004) reh'g en banc denied, Feb. 5, 2005 (testimony by the handler that the dog was trained and certified was sufficient to show reliability for purposes of probable cause); *United States v. Lopez*, 380 F.3d 538 (1st Cir. 2004), cert. denied, 543 U.S. 1074, 125 S.Ct. 924, 160 L.Ed.2d 812 (2005) (handler's testimony that the dog was certified on the day of the sniff and had never given a false indication was sufficient to show reliability); *United States v. Boxley*, 373 F.3d 759 (6th Cir.), cert. denied,

543 U.S. 972, 125 S.Ct. 435, 160 L.Ed.2d 345 (2004); *United States v. Outlaw*, 319 F.3d 701 (5th Cir. 2003) (reliability acceptable when handler and dog have completed all standard training procedures for drug detecting teams); *United States v. Hill*, 195 F.3d 258 (6th Cir. 1999), cert. denied, 528 U.S. 1176, 120 S.Ct. 1207, 145 L.Ed.2d 1110 (2000) (handler's inability to state with precision what in-service training should be conducted; reliability nonetheless established); *United States v. Sundby*, 186 F.3d 873 (8th Cir. 1999) (training records were not required to show reliability). And recently, in *U.S. v. \$1,032,980.00 in U.S. Currency*, --- F.Supp.2d ---, 2012 WL 684757 (N.D. Ohio March 2, 2012), the court recognized that according to the Sixth Circuit precedent, "detector dog reliability is established by credible testimony from the dog's handler/partner (or, arguably, by other knowledgeable and credible witnesses) that the dog was trained and certified.

The Supreme Court has repeatedly held that a drug dog sniff is not a search under the Fourth Amendment and a reliable dog alert provides probable cause that illegal drugs are present. *Illinois v. Caballes*, 543 U.S. 405 (2005). Moreover, the United States Fourth Circuit Court of Appeal recently held "We have rejected a requirement that "dog alert testimony must satisfy the requirements for expert scientific testimony ... [because] the dog's alert ... would

serve not as actual evidence of drugs, but simply to establish probable cause to obtain a warrant to search for such substantive evidence." *United States v. Allen*, 159 F.3d 832, 839–40 (4th Cir.1998)." *U.S. v. Age*, Slip Copy, 2011 WL 4495307 C.A.4 (Md.2011). "Assuming, without deciding, that we would require specific evidence of a dog's reliability before permitting his alert to provide probable cause, we find sufficient evidence in this case. The Government provided evidence regarding the dog's detailed training and continuing certification." *Age*, *supra*.

Notably, the United States Court of Appeals for the Eight Circuit announced in *United States v. Olivera-Mendez*, 484 F.3d 505, 512 (8<sup>th</sup> Cir. 2007), "We have held that to establish a dog's reliability for the purpose of a search warrant application, the affidavit need only state the dog has been trained and certified to detect drug and a detailed account of the dog's track record or education is unnecessary." If the canine's reliability in a search warrant affidavit is established by merely stating that the dog is trained and certified allowing for a finding of probable cause to issue the warrant to enter into someone's property, then it goes without saying that establishing the canine's training and certification through testimony at a motion to suppress should surely be sufficient to establish a *prima facie* finding of reliability that the defendant may rebut at the hearing. See; *United States v. Klein*, 626 F.2d 22 (7<sup>th</sup> Cir. 1980)



(finding the affiant's representation to the magistrate that the dog "graduated from a training class in drug detection in October 1978" and "has proven reliable in detecting drug and narcotics on prior occasions" sufficient) and *United States v. Berry*, 90 F.3d 148 (6<sup>th</sup> Cir. 1996) (finding contrary to defendant's suggestion; to establish probable cause, the affidavit need not describe the particulars of the dog's training. Instead, the affidavit's accounting of the dog's sniff indicating the presence of controlled substances and its reference to the dog's training in narcotics investigations was sufficient to establish the dog's training and reliability.)

Drawing an analogy to search warrant law, the State's search warrant is presumed valid at a motion to suppress hearing. When the defendant is challenging the validity of a search warrant, the prosecution is afforded a presumption that the issuing magistrate acted properly in determining probable cause prior to signing the warrant. The presumption may be rebutted by the defendant, but the burden is on the defendant to attack the foundation of the warrant.

Factually, this court has come across many cases where an officer has smelled the odor of an illegal substance and searched. *United States v. Sharpe*, 470 U.S. 675 (1985) is one such case. "After confirming his [D.E.A. agent] suspicion that the truck was overloaded and upon smelling marihuana, the agent opened the rear of the



camper without Savage's permission and observed a number of burlap-wrapped bales resembling bales of marihuana that the agent had seen in previous investigations. The agent then placed Savage under arrest and, returning to the Pontiac, also arrested Sharpe. Chemical tests later showed that the bales contained marihuana." *Sharpe* at 675. *New York v. Belton*, 453 U.S. 950 (1981) created the doctrine of search incident to arrest as related to automobiles stops. *Belton* factually started with the stopping officer smelling marihuana emanating from a car at a traffic stop. The law legally recognizes a law enforcement officer's ability to smell narcotics and search. However, Florida Supreme Court instituted, with their holding, a mandated statistical analysis in order to be able to ascertain if there is probable cause to search because the *Harris* court found that an alert by a well-trained drug dog to the exterior of a vehicle only provides 'mere suspicion' of criminal activity. The law does not require a statistical analysis of the nose of police officers. If the officers in *Sharpe* and *Belton* had smelled marihuana odor, from a joint completely smoked 5 minutes before the traffic stop but no drugs were found in the car, would their search be deemed wrong or illegal? The answer is a simple 'no', as long as the officer had the prerequisite training and experience to recognize such odor as illegal contraband. It should be the same standard for well-trained narcotics dogs and their handlers.

Therefore, the legal philosophy of the request of the amici is already well established in United States criminal law. The amici are merely requesting that this Honorable Court treat the issue of a dog's training and/or certification in the same fashion. The *Amici* wish to emphasize that in reversing the Florida Supreme Court and establishing this presumption, in no way deprives the defendant of his right to confront the officer regarding his canine partner's reliability. The training records and certification documentation are discoverable. They can be reviewed by the defendant and challenged in court. The trial court, at the close of all the evidence at the motion to suppress, is still free to determine the reliability of the dog. Enabling the State to make this *prima facie* showing merely puts the proverbial ball in the defendant's court and deprives him of nothing.

The significant flaw in the Florida Supreme Court's *Harris* analysis is the focus on their requirement that the state be mandated to present to the trial court the dog's field performance records, along with concentrating on the issue of residual odor. The Florida Supreme Court's mistake is losing sight of the basic premise that dogs do not find drugs but instead locate drug odor. The rigorous testing standards set forth by the independent national governing bodies for narcotics dog certification are being

basically ignored in the *Harris* reasoning. (See, Appendix pgs. A-1-4) They need to be given their due deference in court.

By concluding that "...when a dog alerts, the fact that the dog has been trained and certified is simply not enough to establish probable cause to search the interior of the vehicle and the person," the Florida Supreme Court in *Harris v. State*, 71 So. 3d 756, 767 (Fla. 2011), failed to adhere to precedent clearly established by this Court that an alert by a well-trained drug detection canine provides an officer with probable cause to search. *U.S. v. Place*, 462 U.S. 696, 706-07 (1983); *Illinois v. Caballes*, 543 U.S. 405, 409-410 (2005). The Florida Supreme Court has set forth the wrong standard of review for the reliability of a drug dog combined with the *Harris* rationale that an exterior alert, by a well-trained dog to a vehicle, provides only 'mere suspicion' of criminal activity. The Florida Supreme Court's exclusively focuses on a statistical analysis of field performance records to determine a narcotics canine's reliability while ignoring the evidence of training and certification is clearly erroneous.

### Conclusion

"Lies, damned lies, and statistics" is a phrase attributed to Mark Twain in describing the persuasive power of numbers, particularly the use of statistics to bolster weak arguments. This Court should reverse the Florida Supreme Court's weak argument which focuses on a purely statistical vetting of field performance records because allowing the ruling to stand would threaten a widely used drug-fighting tactic, the narcotics detection dog. The Florida Supreme Court's decision conflicts with this high court's precedents in *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *United States v. Place*, 462 U.S. 696 (1983). Therefore, this Court should tell the Florida Supreme Court that you meant what you said: that a well-trained narcotics canine provides probable cause to search and reverse the Florida Supreme Court.

Respectfully submitted,

Arthur T. Daus III  
2417 N.E. 22<sup>nd</sup> Terrace  
Fort Lauderdale, Florida 33305  
[Tel.] (954) 242-5584  
Ted.Daus@PoliceK-9Magazine.com  
Counsel for *Amici Curiae*

June 2012

## **APPENDIX**

**NATIONAL POLICE CANINE ASSOCIATION  
NARCOTICS STANDARDS FOR CERTIFICATION**

**Narcotic Certification**

A minimum of two (2) Certified Detector Officials are required for certification.

K-9 Team must locate at least three (3) out of the four (4) finds to certify. This results in a success of seventy-five (75) percent minimum score for certification.

Canine's alert must be obvious to the Certifying Officials.

Certifying Officials may terminate certification at their discretion.

Non-scented objects may be used to mark finds.

No electrical collars and/or equipment resembling same are allowed.

**Protest:** The handler shall immediately notify the Certifying Officials within 30 minutes of any protest. The protest shall be in writing. If either Official feels the test was effected by the situation that caused the protest, this portion of the test should be re-run. If the test is not re-run, the protest should be forwarded within twenty-four



hours to the Standards Committee Chairman. The Chairman will as quickly as possible pass this on to two (2) members of the committee who will vote on approving or disapproving the protest. The Chairman will notify the handler as soon as possible of the results and if needed discuss the retest with out additional certification fees. Only in cases where the certification failed due to this protested event, will this process be used. Otherwise it will be decided by the Certifying Officials conducting the test.

If K-9 Team fails certification, K-9 Team must wait for five (5) days prior to attempting to certify.

**Search:**

Search shall consist of three (3) indoor rooms and four (4) vehicles with a total of four (4) finds.

Time on searches is **ten (10) minutes for indoor searches and eight (8) minutes for vehicle searches**. A one (1) minute warning at the request of the handler prior to the end of the search may be given. Time begins when the handler begins search and time ends when the handler calls time or upon expiration of time. Handler may call finds by calling time or after the expiration of the time.

**Indoor Search:** Shall consist of three (3) indoor rooms and two (2) finds.

Each room shall be at least 380 sq. ft., but no more than 600 sq. ft. (Exceptions may be made according to the Certifying Officials).

No more than one (1) find will be concealed in a room. (Therefore, no find will be concealed in one (1) of the three (3) rooms).

**Vehicle Search:** Shall consist of four (4) vehicles and two (2) finds. Narcotic finds may be concealed in the interior or exterior of the vehicles. No more than one (1) find may be concealed on a vehicle. (Therefore, no find will be concealed in or on two (2) of the four (4) vehicles).

Due to the numerous makes and models of vehicles available to departments, the decision upon what types of vehicles to be used is the Certifying Officials' discretion.

**Finds:**

All finds shall consist of Controlled Substances classified by law. Two (2) of the finds shall be soft drugs (marijuana) and two finds shall be hard drugs (cocaine or crack cocaine).

Finds shall be concealed in search area at least thirty (30) minutes prior to search.

Finds shall be concealed by a Certifying Official or another person directed by an Certifying Official.

Two (2) finds shall be concealed in the indoor rooms consisting of one (1) soft drug (marijuana) and one (1) hard drug (cocaine or crack cocaine). Two (2) finds shall be concealed in/or on the vehicles consisting of one (1) soft drug (marijuana) and one (1) hard drug (cocaine or crack cocaine).

All finds shall not weigh less than eight (8) grams or more than twenty-eight (28) grams.

No finds shall be concealed higher than eight (8) feet from the floor level.

All finds shall be concealed from view in a manner that the canine cannot retrieve said finds.

All search areas must be contaminated and finds proofed by a canine prior to search, if available.

**Additional Substances:**

The K-9 Team must complete certification prior to testing on additional substances.

Search area shall consist of one (1) room with one (1) find in said room.

Time for additional substances search shall not exceed five (5) minutes per room.

**AMICUS  
CURIAE  
BRIEF**

**In The  
Supreme Court of the United States**

---

STATE OF FLORIDA,

*Petitioner,*

v.

CLAYTON HARRIS,

*Respondent.*

---

On Writ of Certiorari to the  
Supreme Court of Florida

---

**BRIEF OF *AMICUS CURIAE* THE RUTHERFORD  
INSTITUTE IN SUPPORT OF RESPONDENT**

---

Anand Agneshwar  
*Counsel of Record*  
ARNOLD & PORTER LLP  
399 Park Avenue  
New York, NY 10022  
(212) 715-1000  
anand.agneshwar@aporter.com

John W. Whitehead  
Rita M. Dunaway  
Douglas R. McKusick  
Charles I. Lugosi  
THE RUTHERFORD INSTITUTE  
1440 Sachem Place  
Charlottesville, VA 22901  
(434) 978-3888

Lisa S. Blatt  
Carl Nadler  
Michael B. Bernstein  
Anna K. Thompson  
ARNOLD & PORTER LLP  
555 Twelfth Street, NW  
Washington, DC 20004  
(202) 942-5000

*Counsel for Amicus Curiae*

## QUESTION PRESENTED

1. Whether a dog alert can establish probable cause where there is "scarce" evidence of the dog's training and no evidence of the dog's prior track record for alerting with accuracy.



## TABLE OF CONTENTS

|                                                                                                                            |     |
|----------------------------------------------------------------------------------------------------------------------------|-----|
| QUESTION PRESENTED .....                                                                                                   | i   |
| TABLE OF AUTHORITIES .....                                                                                                 | iii |
| INTEREST OF <i>AMICUS</i> .....                                                                                            | 1   |
| SUMMARY OF THE ARGUMENT.....                                                                                               | 2   |
| ARGUMENT .....                                                                                                             | 4   |
| I.    The Fourth Amendment Requires Probable Cause to Be Established by Reliable Evidence .....                            | 6   |
| II.   Serious Questions Exist Regarding the Reliability of Canine Detection Dogs .....                                     | 7   |
| A. Recent Studies Demonstrate the High Error Rates of Canine Detection Dogs..                                              | 8   |
| B. No Uniformity or Minimum Standards Exist for Training or Certifying Drug Detection Dogs .....                           | 12  |
| III.  Requiring the Government to Establish the Reliability of the Canine Search Will Not Overburden Law Enforcement ..... | 15  |
| CONCLUSION .....                                                                                                           | 18  |

## TABLE OF AUTHORITIES

|                                                                                   | Page(s)   |
|-----------------------------------------------------------------------------------|-----------|
| <b>Cases</b>                                                                      |           |
| <i>Alabama v. White</i> , 496 U.S. 325, 330 (1990).....                           | 6, 14     |
| <i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579<br>(1993).....          | 16        |
| <i>Florida v. J.L.</i> , 529 U.S. 266, 274 (2000) .....                           | 16        |
| <i>Florida v. Royer</i> , 460 U.S. 491 (1983) .....                               | 4         |
| <i>Harris v. State</i> , 71 So. 3d 756, 772<br>(Fla. 2011). .....                 | 4, 12, 13 |
| <i>Hernandez v. New York</i> , 500 U.S. 352, 366 (1991) ...                       | 2         |
| <i>Hilton v. State</i> , 961 So. 2d 284, 296 (Fla. 2007).....                     | 6         |
| <i>Illinois v. Caballes</i> , 543 U.S. 405 (2005) .....                           | 4, 8, 11  |
| <i>Illinois v. Gates</i> , 462 U.S. 213, 230-31 (1983) .....                      | 6, 7      |
| <i>Jones v. Commonwealth</i> , 670 S.E.2d 727, 733<br>(Va. 2009) .....            | 13        |
| <i>Laime v. State</i> , 347 Ark. 142, 159 (2001) .....                            | 10        |
| <i>Maryland v. Pringle</i> , 540 U.S. 366, 371 (2003).....                        | 4, 6      |
| <i>State v. Foster</i> , 390 So. 2d 469, 470 (Fla. Dist. Ct.<br>App. 1980) .....  | 13        |
| <i>State v. Foster</i> , 252 P.3d 292, 296 (Ore. 2011) ..                         | 13, 14    |
| <i>Time, Inc. v. Firestone</i> , 424 U.S. 448, 463 (1976).....                    | 2         |
| <i>United States v. \$242,484.00</i> , 351 F.3d 499, 511<br>(11th Cir. 2003)..... | 10        |
| <i>United States v. Clarkson</i> , 551 F.3d 1196, 1200<br>(10th Cir. 2009).....   | 13        |
| <i>United States v. Diaz</i> , 25 F.3d 392, 394<br>(6th Cir. 1994).....           | 5, 7      |

|                                                                                                              |       |
|--------------------------------------------------------------------------------------------------------------|-------|
| <i>United States v. Florez</i> , 871 F. Supp. 1411, 1420<br>(D.N.M. 1994).....                               | 5, 17 |
| <i>United States v. Fontenette</i> , No. 07-60028, 2008 WL<br>4547507, at *11 (W.D. La. Oct. 10, 2008) ..... | 7     |
| <i>United States v. Ho</i> , 94 F.3d 932, 936<br>(5th Cir. 1996).....                                        | 6     |
| <i>United States v. Kennedy</i> , 131 F.3d 1371, 1378<br>(10th Cir. 1997).....                               | 10    |
| <i>United States v. Limares</i> , 269 F.3d 794, 797<br>(7th Cir. 2001).....                                  | 10    |
| <i>United States v. Lingenfelter</i> , 997 F.2d 632, 639<br>(9th Cir. 1993).....                             | 5     |
| <i>United States v. Longmire</i> , 761 F.2d 411, 417-18<br>(7th Cir. 1985).....                              | 6     |
| <i>United States v. Place</i> , 462 U.S. 696, 702 (1983) .....                                               | 4     |
| <i>United States v. Scarborough</i> , 128 F.3d 1373, 1378<br>& n.3 (10th Cir. 1997).....                     | 10    |
| <i>United States v. Trayer</i> , 898 F.2d 805, 809 (D.C. Cir.<br>1990).....                                  | 11    |

## TABLE OF AUTHORITIES—Continued

|                                                                                                                                                                                                                                                                                                                                                                          | Page(s)   |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| <b>Rules</b>                                                                                                                                                                                                                                                                                                                                                             |           |
| Fed. R. Evid. 702 .....                                                                                                                                                                                                                                                                                                                                                  | 16        |
| <b>Other Authorities</b>                                                                                                                                                                                                                                                                                                                                                 |           |
| Anna Patty, <i>Sniffer Dogs Get It Wrong Four out of Five Times</i> , Sydney Morning Herald, Dec. 12, 2011, available at <a href="http://www.smh.com.au/environment/animals/sniffer-dogs-get-it-wrong-four-out-of-five-times-20111211-1opr.html">http://www.smh.com.au/environment/animals/sniffer-dogs-get-it-wrong-four-out-of-five-times-20111211-1opr.html</a> ..... | 9         |
| Code Blue Designs, <i>Managing K9 Sniff Reliability in Your KANINE Records</i> , <a href="http://www.kaninesoftware.com/help/videos/k95/Reliability/Reliability.html">http://www.kaninesoftware.com/help/videos/k95/Reliability/Reliability.html</a> (last visited Aug. 27, 2012) .....                                                                                  | 15        |
| Code Blue Designs, <i>Our Customers</i> , <a href="http://www.codebluedesigns.com/customers.htm">http://www.codebluedesigns.com/customers.htm</a> (last visited Aug. 27, 2012) .....                                                                                                                                                                                     | 16        |
| Code Blue Designs, <i>Screen Videos: Watch Our Capture Videos to See Just How Easy KANINE 5.0 Is to Use</i> , <a href="http://www.codebluedesigns.com/videos.htm">http://www.codebluedesigns.com/videos.htm</a> (last visited Aug. 27, 2012) .....                                                                                                                       | 15        |
| Dan Hinkel & Joe Mahr, <i>Drug Dogs Often Wrong: Police Canines Can Fall Short, But Observers Cite Residue and Poor Training As Factors</i> , Chi. Tribune, Jan. 6, 2011, available at 2011 WLNR 3183913 (Westlaw) .....                                                                                                                                                 | 8, 13, 14 |

|                                                                                                                                                                                                                                                                                                                                                           |       |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| Eden Consulting Grp., <i>KATS™ Generation 4 K9 Activity Tracking System: Client List &amp; Testimonials</i> , <a href="http://www.kats.ca/clients.html">http://www.kats.ca/clients.html</a> (last visited Aug. 27, 2012) .....                                                                                                                            | 16    |
| Fed. Aviation Admin., Kelly J. Garner et al., <i>Duty Cycle of the Detector Dog: A Baseline Study</i> , at 12 fig. 3 (Apr. 2001), available at <a href="http://info.dsiiti.com/Portals/40565/docs/6-8-09duty cycle of police dog.pdf">http://info.dsiiti.com/Portals/40565/docs/6-8-09duty cycle of police dog.pdf</a> .....                              | 8     |
| Laurence Hammack, <i>Drug Dog's Nose Is Good Enough, Judge Rules in Cocaine Case</i> , Roanoke Times, June 30, 2012 .....                                                                                                                                                                                                                                 | 10    |
| Lawrence Mower & Brian Haynes, <i>Legal Challenge Questions Reliability of Police Dogs</i> , Las Vegas Rev.-J. (July 9, 2012), available at <a href="http://www.lvrj.com/news/legal-challenge-questions-reliability-of-police-dogs-161759505.html">http://www.lvrj.com/news/legal-challenge-questions-reliability-of-police-dogs-161759505.html</a> ..... | 11    |
| Lisa Lit et al., <i>Handler Beliefs Affect Scent Dog Detection Outcomes</i> , 14 Animal Cognition 387 (2011) .....                                                                                                                                                                                                                                        | 9, 10 |
| Nat'l Pub. Radio, <i>Report: Drug-Sniffing Dogs Are Wrong More Often Than Right</i> (Jan. 7, 2011) .....                                                                                                                                                                                                                                                  | 8     |
| Nicole Benson, <i>NHP Troopers Sue Department over K-9 Program</i> , KLAS-TV News Las Vegas (June 26, 2012), available at <a href="http://www.8newsnow.com/story/18886948/2012/06/26/nhp-troopers-sue-department-over-k-9-program">http://www.8newsnow.com/story/18886948/2012/06/26/nhp-troopers-sue-department-over-k-9-program</a> .....               | 11    |
| Richard E. Myers II, <i>Detector Dogs and Probable Cause</i> , 14 Geo. Mason L. Rev. 1, 22 (2006) .....                                                                                                                                                                                                                                                   | 11    |

|                                                                                                                                         |            |
|-----------------------------------------------------------------------------------------------------------------------------------------|------------|
| Robert C. Bird, <i>An Examination of the Training and Reliability of the Narcotics Detection Dog</i> , 85 Ky. L.J. 405, 432 (1997)..... | 11, 13, 14 |
|-----------------------------------------------------------------------------------------------------------------------------------------|------------|



## INTEREST OF *AMICUS*<sup>1</sup>

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing *pro bono* legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. At every opportunity, The Rutherford Institute will resist the erosion of fundamental civil liberties that many would ignore in a desire to increase the power and authority of law enforcement. The Rutherford Institute believes that where such increased power is offered at the expense of civil liberties, it achieves only a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

The Rutherford Institute is interested in the instant case because it is committed to ensuring the continued vitality of the Fourth Amendment. A decision reversing the Florida Supreme Court would constitute a major step toward police discretion to conduct intrusive vehicle searches based on nothing more than an alert by a dog with undemonstrated training and detection skills. This would erode the

---

<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this *amicus* brief have been filed with the Clerk of the Court.

bedrock requirement of probable cause and would jeopardize all citizens' Fourth Amendment rights.

## SUMMARY OF THE ARGUMENT

An alert by a purported “drug detection” dog does not, by itself, provide probable cause to search.<sup>2</sup> To have meaning, the alert must be supported by evidence suggesting that it provides a reasonable basis for belief in guilt. Because the government bears the burden of making that showing, the Florida Supreme Court correctly held that a reasonable basis can come only from records

---

<sup>2</sup> Petitioner and the United States mischaracterize the record in asserting that this case involves a “well-trained” or “certified” detection dog. See Br. for Pet’r, at i, 8, 9, 11, 15, 16, 19, 20, 21, 22, 23, 24, 25, 27, 28, 30, 33, 34, 36, 37, 39, *Florida v. Harris*, No. 11-817 (hereinafter “Pet’r’s Br.”) (characterizing the case as involving a “well-trained” narcotics dog); Br. for the United States as Amicus Curiae Supp. Pet’r, at i, 1, 2, 5, 7, 8, 10, 12, 13, 23, 24, 26, 28, *Florida v. Harris*, No. 11-817 (characterizing the case as involving a “trained” detection dog). In fact, the Florida Supreme Court expressly found the record “scarce on the details of Aldo’s training, including whether the trainer was aware of the location of the drugs and whether the training simulated a variety of environments and distractions.” *Harris v. State*, 71 So. 3d 756, 772 (Fla. 2011).

The Florida Supreme Court’s conclusion that there was little evidence establishing that the dog was well- or adequately trained is entitled deference. *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (“[I]n the absence of exceptional circumstances, we should defer to state-court factual findings, even when those findings relate to a constitutional issue.”) (citations omitted); *Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976) (“Even where a question of fact may have constitutional significance, we normally accord findings of state courts deference in reviewing constitutional claims here.”) (citations omitted).

explaining the dog's training and its real-world track record.

Dog alerts are not inherently reliable. One recent study concluded that officers found drugs or other paraphernalia in only 44 percent of cases in which dogs had alerted and just 27 percent of the time when the driver was Latino.<sup>3</sup> Mistaken alerts can be attributed to the dog's ability and training, or to how the dog is handled by the law enforcement officer.

Nor is an unexplained "certification" sufficient by itself to ensure the dog's reliability. Because there are no uniform standards governing certification, the fact that a dog holds a certification—a piece of paper—is meaningless without an accompanying explanation of what went into the certification.

The Florida Supreme Court simply required the State to provide a meaningful basis for assessing whether a particular dog has the training and performance history to make its alert a reliable indicator of the presence of contraband. That requirement comports with established Fourth Amendment principles.

In this case, the State offered *no evidence* that the canine was reliable: the dog was not certified and trained to detect the kind of drugs found during the illegal search, there was no testimony explaining the dog's "satisfactory" rating in training sessions, and there were no field performance records

---

<sup>3</sup> See *infra* note 6 and accompanying text.

documenting the dog's rate of false-positives. *Harris*, 771 So. 3d at 760, 772. In fact, the same dog alerted to the same car and against the same defendant two months after the stop-in-question, and *no illegal contraband was found*. *Id.* at 761.

## ARGUMENT

The Florida Supreme Court held that to establish probable cause based on a canine alert, the State must provide sufficient evidence of the dog's training and performance to show the "dog's reliability in being able to detect the presence of illegal substances within the vehicle." *Harris*, 71 So. 3d at 759. This common sense approach is consistent with this Court's long-standing rule that probable cause "depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).<sup>4</sup>

Standing alone, the simple fact that "a dog is certified should not be sufficient in and of itself to

---

<sup>4</sup> Petitioner admits that this Court's prior decisions do not address the circumstances in which a dog alert can provide probable cause. Pet'r's Br., at 20. The case, *Florida v. Royer*, 460 U.S. 491 (1983), did not involve a drug detection dog. *United States v. Place* addressed only the "reasonableness under the Fourth Amendment of warrantless seizures of personal luggage from the custody of the owner on the basis of *less than probable cause* . . . ." *United States v. Place*, 462 U.S. 696, 702 (1983) (emphasis added). The subsequent opinion in *Illinois v. Caballes*, 543 U.S. 405 (2005), was limited to whether use of a drug detection dog during a routine traffic stop—without more—constituted a search. Indeed, the Court has not previously addressed the issue here, i.e., whether an alert by a "certified" narcotics detection dog provides probable cause to conduct a warrantless search absent sufficient evidence that the dog's certification was provided under circumstances suggesting that the dog's alert was likely to be reliable.

establish probable cause.” *United States v. Florez*, 871 F. Supp. 1411, 1420 (D.N.M. 1994) (citation omitted). There is no uniform standard for training and certification for narcotics detection dogs, and therefore no basis that prequalify alerts by such dogs as reliable. Moreover, recent studies have demonstrated that these dogs are prone to high error rates.

Rather, for “a positive dog reaction to support a determination of probable cause, the training and reliability of the dog must be established” through evidence of a dog’s training and performance records. *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir. 1994) (citing *United States v. \$67,220 in U.S. Currency*, 957 F.2d 280, 285 (6th Cir. 1992), which considered dog alert evidence “weak” because “the government did not obtain testimony from the dog’s handler or anyone else familiar with the performance or reliability of the dog”); *United States v. Lingenfelter*, 997 F.2d 632, 639 (9th Cir. 1993) (“A canine sniff alone can supply the probable cause necessary for issuing a search warrant *if the application for the warrant establishes the dog’s reliability.*”) (emphasis added; citation omitted).

Reversal of the Florida Supreme Court’s decision would jeopardize the Fourth Amendment’s constitutional safeguards by permitting searches based on unknown and unsubstantiated training and standards.



## I. The Fourth Amendment Requires Probable Cause to Be Established by Reliable Evidence

The government “bears the ultimate burden of proving that the officer had probable cause.” *United States v. Ho*, 94 F.3d 932, 936 (5th Cir. 1996) (citation omitted); *Hilton v. State*, 961 So. 2d 284, 296 (Fla. 2007) (“When a search or seizure is conducted without a warrant, the government bears the burden of demonstrating that the search or seizure was reasonable.”) (citation omitted). *See also* Pet’r’s Br., at 24 (recognizing that “the State has the burden to establish probable cause”). Requiring the opposite—*i.e.*, forcing the defendant to prove the absence of a reasonable suspicion—without knowledge of what the officer based his assessment of reasonable suspicion imposes an “impossible burden.” *United States v. Longmire*, 761 F.2d 411, 417-18 (7th Cir. 1985) (rejecting conclusion that burden of proof was on defendant to show a lack of reasonable suspicion).

Probable cause is established only when there is a “*reasonable* ground for belief of guilt, and [ ] the belief of guilt [is] particularized with respect to the person to be searched or seized.” *Pringle*, 540 U.S. at 371 (emphasis added; quotation marks and citations omitted). It is, therefore, “dependent upon both the content of information possessed by police and its degree of reliability . . . and [is] considered in the totality of the circumstances—[it is] the whole picture, that must be taken into account . . . .” *Alabama v. White*, 496 U.S. 325, 330 (1990) (quotation marks and citations omitted). *See also Illinois v. Gates*, 462 U.S. 213, 230-31 (1983) (“This totality-of-the-circumstances approach is far more



consistent with our prior treatment of probable cause than is any rigid demand that specific ‘tests’ be satisfied by every informant’s tip.”). Although outlining the broad contours of probable cause, this Court repeatedly has emphasized that probable cause cannot be based on “finely-tuned standards” and is a “fluid concept turning on the assessment of probabilities in particular factual contexts—not readily or even usefully, reduced to a neat set of rules.” *Id.* at 232, 235. In other words, the Fourth Amendment requires an assessment of *all* pertinent facts in assessing whether probable cause exists.

When certain evidence—like a dog’s alert—is the linchpin in the probable cause analysis, the government must demonstrate that the information used in making the probable cause determination was reliable and, therefore, reasonable. *See, e.g., Diaz*, 25 F.3d at 393 (“For a positive dog reaction to support a determination of probable cause, the training and reliability of the dog must be established.”) (citation omitted); *United States v. Fontenette*, No. 07-60028, 2008 WL 4547507, at \*11 (W.D. La. Oct. 10, 2008) (finding lack of probable cause where officer testified to smelling cocaine but acknowledged he had “no training in detecting the odor of cocaine” and was “not certified as an expert in detecting the odor of cocaine”). The State failed to do so here.

## II. Serious Questions Exist Regarding the Reliability of Canine Detection Dogs

Petitioner inappropriately assumes that a certified dog must necessarily be reliable, citing to fictional literature and news articles that do not

directly address the accuracy of canine olfactory senses. Pet'r's Br., at 16-19. Quite to the contrary, sniffs by a trained dog are not inherently reliable. The concept of the "infallible dog . . . is a creature of legal fiction." *Caballes*, 543 U.S. at 411 (Souter, J., dissenting).

#### A. Recent Studies Demonstrate the High Error Rates of Canine Detection Dogs

Studies have shown that even well-trained drug detection dogs have a significant false-positive alert rate.<sup>5</sup> For instance, the Chicago Tribune searched cases spanning a period of three years involving canine sniffs of automobiles.<sup>6</sup> Dan Hinkel & Joe Mahr, *Drug Dogs Often Wrong: Police Canines Can Fall Short, But Observers Cite Residue and Poor Training As Factors*, Chi. Tribune, Jan. 6, 2011, available at 2011 WLNR 3183913 (Westlaw) (hereinafter "Chicago Tribune Study"). Its analysis found that officers found drugs or other paraphernalia in only 44 percent of cases in which dogs had alerted and just 27 percent of the time when the driver was Latino. *Id.*<sup>7</sup>

---

<sup>5</sup> The record below is devoid of evidence on whether Aldo, the dog in question here, would even qualify as a "well-trained" drug detection dog. See *supra* note 2.

<sup>6</sup> See also Nat'l Pub. Radio, *Report: Drug-Sniffing Dogs Are Wrong More Often Than Right* (Jan. 7, 2011), <http://www.npr.org/blogs/thetwo-way/2011/01/07/132738250/report-drug-sniffing-dogs-are-wrong-more-often-than-right>.

<sup>7</sup> See also Fed. Aviation Admin., Kelly J. Garner et al., *Duty Cycle of the Detector Dog: A Baseline Study*, at 12 fig. 3 (Apr. 2001), available at [http://info.dsiiti.com/Portals/40565/docs/6-8-09\\_dutycycle\\_of\\_police\\_dog.pdf](http://info.dsiiti.com/Portals/40565/docs/6-8-09_dutycycle_of_police_dog.pdf) (finding dogs in

Recently, the double-blind "UC Davis Study" likewise shook pre-existing beliefs that dog alerts are generally reliable. Lisa Lit et al., *Handler Beliefs Affect Scent Dog Detection Outcomes*, 14 Animal Cognition 387 (2011) (hereinafter "UC Davis Study"). Over the span of two days, 18 trained and certified drug detection canines and their handlers took part in a meticulously prepared experiment to study the influence of handler bias on narcotics detection dogs' performance. *Id.* at 389-90.

Experimenters told the human handlers that drugs might be present at the testing site, but in fact, there were no contraband drugs in any of the test areas. Thus, any alerts would be false alerts, and zero alerts would be considered a perfect score. *Id.* at 389. Each team completed two five-minute searches in each of four search areas. *Id.* The results were astonishing: the correct response rate was only 15% (21 clean runs), and the error rate was 85% (123 runs). *Id.* at 390. Only one dog of the 18 trained drug detection dogs did not falsely alert. *Id.* at 390 fig. 1, team 6. The UC Davis Study concluded that the enormous number of false alerts confirmed the hypothesis that handler beliefs influenced the reliability of the trained drug detection dogs. *Id.* at 391, 394.

---

artificial testing situations return false positives anywhere from 12.5 to 60 percent); Anna Patty, *Sniffer Dogs Get It Wrong Four out of Five Times*, Sydney Morning Herald, Dec. 12, 2011, available at <http://www.smh.com.au/environment/animals/sniffer-dogs-get-it-wrong-four-out-of-five-times-20111211-1oprv.html> (study demonstrating that 80% of canine searches (11,248 of 14,102 searches) resulted in false positives).

Many courts similarly have recognized that well-trained detection dogs are not infallible and provide false alerts at an alarming rate. *See, e.g., United States v. Kennedy*, 131 F.3d 1371, 1378 (10th Cir. 1997) (describing a dog that had a 71% accuracy rate); *United States v. Scarborough*, 128 F.3d 1373, 1378 & n.3 (10th Cir. 1997) (describing a dog that erroneously alerted 4 times out of 19 while working for the postal service and 8% of the time over its entire career); *United States v. Limares*, 269 F.3d 794, 797 (7th Cir. 2001) (describing a dog that gave false positives between 7% and 38% of the time); *Laime v. State*, 347 Ark. 142, 159 (2001) (describing a dog that made between 10 and 50 errors); *United States v. \$242,484.00*, 351 F.3d 499, 511 (11th Cir. 2003) (noting that because as much as 80% of all currency in circulation contains drug residue, a dog alert “is of little value”), *vacated on other grounds by rehearing en banc*, 357 F.3d 1225 (11th Cir. 2004).<sup>8</sup>

Even more troubling is that some of the errors are due to potential handler cuing. Three handlers in the UC Davis Study admitted to *intentionally* overly cueing their dogs to alert at certain locations. UC Davis Study, at 392. Two months ago, a group of Nevada Highway Patrol troopers filed a complaint alleging that drug detection dogs were purposely “being trained to operate as so-called trick ponies, or dogs that provide officers false alerts for the

---

<sup>8</sup> See also Laurence Hammack, *Drug Dog’s Nose Is Good Enough, Judge Rules in Cocaine Case*, Roanoke Times, June 30, 2012 (describing one drug detection dog’s 74% error rate—alerting correctly only 22 of 85 times).

presence of drugs.”<sup>9</sup> Handler cuing can result in “a search based on the dog’s response to the handler’s emotions rather than its response to the presence of contraband.” Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. 1, 22 (2006). At least one federal circuit has become “mindful” that “the possibility of unconscious ‘cuing’, may well jeopardize the reliability of dog sniffs.” *United States v. Trayer*, 898 F.2d 805, 809 (D.C. Cir. 1990). If true—that a handler’s errors account for nearly every false alert—an “examination of a handler’s qualifications should receive particular judicial scrutiny.” See also Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 432 (1997).

But whether the false positive rate is due to “errors by their handlers [or] the limitations of the dogs themselves,” the bottom line is that an alert by a drug detection dog is not alone sufficiently reliable to establish probable cause. *Caballes*, 543 U.S. at 411 (Souter, J., dissenting). Allowing the State to establish probable cause on nothing more than an

---

<sup>9</sup> Nicole Benson, *NHP Troopers Sue Department over K-9 Program*, KLAS-TV News Las Vegas (June 26, 2012), available at <http://www.8newsnow.com/story/18886948/2012/06/26/nhp-troopers-sue-department-over-k-9-program>; Lawrence Mower & Brian Haynes, *Legal Challenge Questions Reliability of Police Dogs*, Las Vegas Rev.-J. (July 9, 2012), available at <http://www.lvrj.com/news/legal-challenge-questions-reliability-of-police-dogs-161759505.html> (discussing Nevada trooper lawsuit and noting that the “American Civil Liberties Union of Nevada has received complaints from people concerned about the reliability of drug dogs . . . [but] the office doesn’t have the expertise to independently verify the claims.”). See also Compl. & Jury Demand, *Moonin v. State*, No. 3:12-cv-00353 (D. Nev. June 26, 2012).



alert by a trained dog, given the error rate and the potential for handler cuing, essentially provides the police with unfettered discretion to conduct a search.

An inquiry that does not look beyond the fact of training and certification ignores “the potential for false alerts, the potential for handler error, and the possibility of alerts to residual odors.” *Harris*, 71 So. 3d at 768. For this reason, the Florida Supreme Court concluded that judges must evaluate probable cause in canine sniff cases based on the totality of the circumstances—including the training and performance record of the dog—and cannot be assessed by looking only to whether someone has been willing to “certify” the dog as trained.

#### **B. No Uniformity or Minimum Standards Exist for Training or Certifying Drug Detection Dogs**

In the “the absence of a uniform standard, the reliability of the dog cannot be established by demonstrating only that a canine is trained and certified” because it “imparts scant information about what the dog has been conditioned to do or not to do, or how successfully.” *Harris*, 71 So. 3d at 756 (citing *Matheson v. State*, 870 So. 2d 8, 14 (Fla. Dist. Ct. App. 2003)) (quotation marks omitted). The Florida Supreme Court observed:

[I]f the court relies only on training and certification records and fails to consider other factors concerning the dog’s performance, then the court does not have a complete picture of the numerous circumstances that



necessarily bear on the reasonableness of the officer's belief in the dog's reliability and whether the dog's alert in a particular case indicates a fair probability that there were drugs present inside the vehicle.

*Id.* at 771.

Training and maintenance programs vary across the country. *Compare United States v. Clarkson*, 551 F.3d 1196, 1200 (10th Cir. 2009) (ten hours a week of maintenance training in K-9 narcotics), *with Jones v. Commonwealth*, 670 S.E.2d 727, 733 (Va. 2009) (training for eight hours every two weeks for both narcotics and utility work), *with State v. Foster*, 252 P.3d 292, 296 (Ore. 2011) (300 total hours of training), *with State v. Foster*, 390 So. 2d 469, 470 (Fla. Dist. Ct. App. 1980) (100 hours training and practice), *with Bird, supra*, at 412 (canine training lasts "only two to six weeks").

There is similarly little, if any, oversight in most jurisdictions for certification and re-certification of narcotics detection dogs. *See, e.g., Chicago Tribune Study, supra* ("The dog teams are not held to any statutory standard of performance in Illinois or most other states . . . ."). Florida, for example, does not have certification standards for drug detection dogs.<sup>10</sup> Some courts have acknowledged that because of "the lack of any statutory standards for or official state oversight of the certification process," certification alone cannot

---

<sup>10</sup> Br. for Resp't, at 45, *Florida v. Harris*, No. 11-817 (hereinafter "Resp't's Br.").

possibly establish a dog's reliability. *Foster*, 252 P.3d at 298 n.6.

A bright-line rule that the State can establish probable cause with nothing more than a "certification"—as suggested by Petitioner—would thus dispense with this Court's long-standing requirement that probable cause be justified on consideration of the "totality of the circumstances." *White*, 496 U.S. at 330. The State would satisfy its probable cause burden simply by representing that the dog had been "certified" by *any* dog training school without *any* obligation to show that the certifying entity was reliable, had used appropriate and accepted training methods, or had in any other way taken steps to assure the sort of real-world reliability that the Fourth Amendment demands.

Further, "[i]nadequate handler training may inhibit the dog's ability to detect narcotics and trigger erroneous alerts." *Bird*, *supra*, at 424.<sup>11</sup> As such, a dog's training and certification says nothing about a dog handler's reliability—both in terms of training or the possibility of cuing. Given "handler error accounts for almost all false detections," *Bird*, *supra*, at 425, finding probable cause solely on the basis of the dog's training and certification flouts the well-established precedent of reasonableness being established by a totality of the circumstances.

---

<sup>11</sup> See also Chicago Tribune Study, *supra* ("[E]ven advocates for the use of drug-sniffing dogs agree with experts who say many dog-and-officer teams are poorly trained and prone to false alerts that lead to unjustified searches. Leading a dog around a car too many times or spending too long examining a vehicle, for example, can cause a dog to give a signal for drugs where there are none, experts said.").

Because there are no uniform standards for a drug detection dog's training and certification, this Court should uphold the Florida Supreme Court's ruling and resist Petitioner's attempt to lower the bar for establishing probable cause by creating a new bright-line requirement that training and certification that pre-qualifies detection dogs as reliable.

### III. Requiring the Government to Establish the Reliability of the Canine Search Will Not Overburden Law Enforcement

Requiring the State to establish the reliability of a drug detection dog is not overly burdensome. Thousands of local police departments across the country already use software programs to record the reliability of canine searches. For example, Code Blue Designs manufactures the "KANINE" record-keeping software, which allows officers to "properly enter records so that your K9's reliability is accurately recorded" and to "enter a K9 training record."<sup>12</sup> Code Blue Designs lists over 650 law

---

<sup>12</sup> Code Blue Designs, *Screen Videos: Watch Our Capture Videos to See Just How Easy KANINE 5.0 Is to Use*, <http://www.codebluedesigns.com/videos.htm> (last visited Aug. 27, 2012). See also Code Blue Designs, *Managing K9 Sniff Reliability in Your KANINE Records*, <http://www.kaninesoftware.com/help/videos/k95/Reliability/Reliability.html> (last visited Aug. 27, 2012) (video tutorial on the Kanine 5.0 program boasts that "KANINE enables you to accurately depict your dog's reliability, with *minimal* effort by you") (emphasis added); *id.* (the software program includes a dropdown bar to record "overall proficiency" of the dog, including categories for alert only, alert with remeter and indication, alert-substantiated by find, alert-substantiated by other, alert-unsubstantiated, did not alert

enforcement agencies that use the Kanine 5.0 program.<sup>13</sup> For the vast majority of cases, therefore, the State need only print out these records and bring them to court. In local jurisdictions that choose not to purchase these software programs, the handler can keep the same basic information—*e.g.*, duration of the stop, type of seizure, no alert/false alert/positive alert—in a log-book for each stop where a canine is deployed.<sup>14</sup>

Nor is establishing reliability of evidence a foreign concept. Courts, for example, require anonymous tips from human informants to have an “indicia of reliability” to establish probable cause for a warrantless stop. *Florida v. J.L.*, 529 U.S. 266, 274 (2000).<sup>15</sup> There is no reason to treat drug detection

---

or indicate, failed to locate person, handler assisted find, handler miss, or K-9 miss).

<sup>13</sup> Code Blue Designs, *Our Customers*, <http://www.codebluedesigns.com/customers.htm> (last visited Aug. 27, 2012). See also Eden Consulting Grp., *KATSTM Generation 4 K9 Activity Tracking System: Client List & Testimonials*, <http://www.kats.ca/clients.html> (last visited Aug. 27, 2012) (listing hundreds of police departments using the KATSTM record-keeping software for K9 training).

<sup>14</sup> See also Resp’t’s Br., at 37 (noting that “[l]aw enforcement agencies already generate, maintain, and disclose field performance data”).

<sup>15</sup> Similarly, courts require evidence to be reliable in other contexts. In allowing an expert witness to testify, courts make a preliminary determination whether the expert is qualified, considering the expert’s education, training, and experience. Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The same reasoning applies with equal force for drug detection dogs and probable cause. *Diaz*, 25 F.3d at 394 (finding “principles [of expert witness qualification] to be useful

dogs any differently. *Florez*, 871 F. Supp. at 1424 (“[W]here records are not kept or are insufficient to establish the dog’s reliability, an alert by such a dog is much like hearsay from an anonymous informant, and corroboration is necessary to support the unproven reliability of the alerting dog and establish probable cause.”); *Jones*, 670 S.E.2d at 732.<sup>16</sup>

\* \* \*

This Court has long held that determining probable cause requires a careful weighing of the totality of the circumstances. In the context of drug detection dogs in automobile searches, this necessarily requires a showing that the dog’s alert is reliable. Because of the inherent unreliability of drug detection dogs and the lack of uniformity and minimal standards in training and certification, however, training and certification alone cannot satisfy even minimum requirements of reliability. The government has the ultimate burden of establishing probable cause, and therefore, should be required to present more—field records or any other evidence that demonstrates an indicia of reliability.

---

guides in evaluating the training and reliability of a drug detection dog for the purpose of determining if probable cause exists based on the results of the dog’s sniff”).

<sup>16</sup> Petitioner argues that trained dogs are nothing like anonymous informants because dogs have no “hidden motivation” in alerting. Pet’r’s Br., at 27-28. This ignores, of course, that the dog’s handlers may have just such a hidden motivation. See *supra* Part II.A (discussing handler mis-cueing). Absent evidence establishing the reliability of the dog’s detection ability, in any event, any statement about the dog’s motivation is pure speculation.



## CONCLUSION

For the reasons set forth above, the decision below should be affirmed.

Respectfully submitted,

Anand Agneshwar

*Counsel of Record*

ARNOLD & PORTER LLP

399 Park Avenue

New York, NY 10022

(212) 715-1000

anand.agneshwar@aporter.com

Lisa S. Blatt

Carl S. Nadler

Michael B. Bernstein

Anna K. Thompson

ARNOLD & PORTER LLP

555 Twelfth Street, NW

Washington, DC 20004

(202) 942-5000

John W. Whitehead

Rita M. Dunaway

Douglas R. McKusick

Charles I. Lugosi

THE RUTHERFORD INSTITUTE

1440 Sachem Place

Charlottesville, VA 22901

(434) 978-3888

*Counsel for Amicus Curiae*



**AMICUS  
CURIAE  
BRIEF**

**In The  
Supreme Court of the United States**

STATE OF FLORIDA,

*Petitioner,*

v.

CLAYTON HARRIS,

*Respondent.*

**On Writ Of Certiorari To The  
Supreme Court Of Florida**

**AMICUS BRIEF OF THE COMMONWEALTH  
OF VIRGINIA AND THE STATES OF ALABAMA,  
ARIZONA, COLORADO, DELAWARE, IDAHO,  
ILLINOIS, INDIANA, KANSAS, MAINE, MICHIGAN,  
MISSOURI, NEBRASKA, NEW JERSEY, NEW  
MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON,  
TEXAS, UTAH, VERMONT, WASHINGTON,  
WISCONSIN, THE COMMONWEALTH OF  
PENNSYLVANIA, THE COMMONWEALTH OF  
PUERTO RICO, AND THE TERRITORY OF GUAM  
IN SUPPORT OF PETITIONER**

KENNETH T. CUCCINELLI, II  
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.  
Solicitor General of Virginia  
dgetchell@oag.state.va.us  
*Counsel of Record*

MICHAEL H. BRADY  
Assistant Attorney General  
mbrady@oag.state.va.us

CHARLES E. JAMES, JR.  
Chief Deputy  
Attorney General

WESLEY G. RUSSELL, JR.  
Deputy Attorney General  
wrussell@oag.state.va.us

OFFICE OF THE  
ATTORNEY GENERAL  
900 East Main Street  
Richmond, Virginia 23219  
Telephone: (804) 786-7240  
Facsimile: (804) 371-0200

June 29, 2012

*Counsel for the  
Commonwealth of Virginia*

JEFFREY S. CHIESA  
Attorney General of  
New Jersey  
P.O. Box 080  
Trenton, NJ 08625-0080

GARY K. KING  
Attorney General of  
New Mexico  
P. O. Drawer 1508  
Santa Fe, New Mexico  
87504-1508

WAYNE STENEHJEM  
Attorney General of  
North Dakota  
600 E. Boulevard Avenue  
Bismark, ND 58505-0040

E. SCOTT PRUITT  
Attorney General  
of Oklahoma  
313 N.E. 21st Street  
Oklahoma City, Oklahoma  
73105-4894

JOHN R. KROGER  
Attorney General  
STATE OF OREGON  
1162 Court St. N.E.  
Salem, Oregon 97301

LINDA L. KELLY  
Attorney General  
COMMONWEALTH  
OF PENNSYLVANIA  
16th Floor,  
Strawberry Square  
Harrisburg, PA 17120

GREG ABBOTT  
Texas Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

MARK L. SHURTLEFF  
Utah Attorney General  
Utah State Capitol  
Suite #230  
P. O. Box 142320  
Salt Lake City, Utah  
84114-2320

WILLIAM H. SORRELL  
Attorney General  
OFFICE OF THE  
ATTORNEY GENERAL  
109 State Street  
Montpelier, VT 05609-1001

ROBERT M. MCKENNA  
Attorney General  
of Washington  
1125 Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100

J. B. VAN HOLLEN  
Attorney General  
of Wisconsin  
PO Box 7857  
Madison, WI 53707-7857

LUTHER STRANGE  
Alabama Attorney General  
ALABAMA ATTORNEY  
GENERAL'S OFFICE  
501 Washington Avenue  
Montgomery, Alabama 36130

TOM HORNE  
Arizona Attorney General  
OFFICE OF THE  
ATTORNEY GENERAL  
1275 West Washington Street  
Phoenix, Arizona 85007

JOHN W. SUTHERS  
Attorney General  
of Colorado  
COLORADO DEPARTMENT  
OF LAW  
1525 Sherman Street  
Denver, Colorado 80203

JOSEPH R. BIDEN, III  
Attorney General  
of Delaware  
Carvel State Office Bldg.  
820 N. French Street  
Wilmington, DE 19801

LAWRENCE G. WASDEN  
Idaho Attorney General  
P.O. Box 83720  
Boise, ID 83720-0010

LISA MADIGAN  
Illinois Attorney General  
100 West Randolph Street,  
12th Floor  
Chicago, Illinois. 60601

GREGORY F. ZOELLER  
Attorney General of Indiana  
IGC-South, Fifth Floor  
302 W. Washington Street  
Indianapolis, Indiana 46204

DEREK SCHMIDT  
Attorney General of Kansas  
JOHN CAMPBELL  
Chief Deputy  
Attorney General  
120 S.W. 10th Avenue,  
2nd Floor  
Topeka, KS 66612

WILLIAM J. SCHNEIDER  
Attorney General of Maine  
Six State House Station  
Augusta, Maine 04333-0006

BILL SCHUETTE  
Michigan Attorney General  
P. O. Box 30212  
Lansing, MI 48909

CHRIS KOSTER  
Attorney General of Missouri  
Supreme Court Building  
207 West High Street  
Jefferson City, MO 65101

JON BRUNING  
Attorney General of  
the State of Nebraska  
P.O. Box 98920  
Lincoln, NE 68509

GREGORY A. PHILLIPS  
Attorney General  
of Wyoming  
123 State Capitol  
Cheyenne, WY 82002

LEONARDO M. RAPADAS  
Attorney General of Guam  
OFFICE OF THE  
ATTORNEY GENERAL  
287 West O'Brien Drive  
Hagatna, Guam 96910

GUILLERMO SOMOZA-  
COLOMBANI  
Attorney General  
LUIS R. ROMÁN NEGRÓN  
Solicitor General  
DEPARTMENT OF JUSTICE  
COMMONWEALTH OF  
PUERTO RICO  
GPO Box 902192  
San Juan, PR 00902-0192

## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                                                                        | Page |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| TABLE OF AUTHORITIES .....                                                                                                                                                                                                                                                                             | ii   |
| STATEMENT OF THE IDENTITY, INTEREST<br>AND AUTHORITY OF AMICI TO FILE.....                                                                                                                                                                                                                             | 1    |
| SUMMARY OF ARGUMENT .....                                                                                                                                                                                                                                                                              | 2    |
| ARGUMENT.....                                                                                                                                                                                                                                                                                          | 3    |
| I. <i>HARRIS'</i> HOLDING THAT LAW<br>ENFORCEMENT MUST MAINTAIN<br>AND PRODUCE EXTENSIVE TRAINING<br>AND FIELD RECORDS BEFORE A<br>TRAINED AND CERTIFIED DOG'S<br>ALERT MAY SERVE AS THE<br>PREDICATE FOR PROBABLE CAUSE<br>TO SEARCH CONFLICTS WITH THE<br>FIRST PRINCIPLES OF PROBABLE<br>CAUSE..... | 3    |
| II. THE <i>HARRIS</i> STANDARD PROMISES<br>CONFLICTING RESULTS THAT WILL<br>FRUSTRATE THE TIME-HONORED<br>AND VITAL ROLE OF DOGS AS<br>INVESTIGATORY TOOLS.....                                                                                                                                        | 12   |
| CONCLUSION.....                                                                                                                                                                                                                                                                                        | 18   |



# TABLE OF AUTHORITIES

|                                                                    | Page                                 |
|--------------------------------------------------------------------|--------------------------------------|
| CASES                                                              |                                      |
| <i>Arizona v. Evans</i> ,<br>514 U.S. 1 (1995).....                | 11                                   |
| <i>Arizona v. Gant</i> ,<br>556 U.S. 332 (2009).....               | 3                                    |
| <i>Atwater v. Lago Vista</i> ,<br>532 U.S. 318 (2001).....         | 3, 17                                |
| <i>Blair v. Commonwealth</i> ,<br>204 S.W. 67 (Ky. 1918) .....     | 13                                   |
| <i>Brinegar v. United States</i> ,<br>338 U.S. 160 (1949).....     | 8                                    |
| <i>Carroll v. United States</i> ,<br>267 U.S. 132 (1925).....      | 3                                    |
| <i>City of Indianapolis v. Edmond</i> ,<br>531 U.S. 32 (2000)..... | 14                                   |
| <i>England v. State</i> ,<br>19 S.W.3d 762 (Tenn. 2000) .....      | 8                                    |
| <i>Florida v. Royer</i> ,<br>460 U.S. 491 (1983).....              | 4, 12                                |
| <i>Harris v. State</i> ,<br>71 So. 3d 756<br>(Fla. 2011).....      | 1, 2, 3, 5, 7, 9, 10, 12, 15, 16, 17 |
| <i>Herring v. United States</i> ,<br>555 U.S. 135 (2008).....      | 18                                   |
| <i>Illinois v. Caballes</i> ,<br>543 U.S. 405 (2005).....          | 4, 5, 10                             |

## TABLE OF AUTHORITIES—Continued

|                                                                                                              | Page            |
|--------------------------------------------------------------------------------------------------------------|-----------------|
| <i>Illinois v. Gates</i> ,<br>462 U.S. 213 (1983).....                                                       | 2, 8, 9, 11, 17 |
| <i>Jones v. Commonwealth</i> ,<br>670 S.E.2d 727 (Va. 2009).....                                             | 7               |
| <i>Jones v. United States</i> ,<br>362 U.S. 257 (1960).....                                                  | 2, 11           |
| <i>Katz v. United States</i> ,<br>389 U.S. 347 (1967).....                                                   | 3               |
| <i>Kentucky v. King</i> ,<br>131 S. Ct. 1849 (2011).....                                                     | 18              |
| <i>Maryland v. Pringle</i> ,<br>540 U.S. 366 (2003).....                                                     | 2, 17           |
| <i>State v. Foster</i> ,<br>252 P.3d 292 (Or. 2011).....                                                     | 8               |
| <i>State v. Nguyen</i> ,<br>726 N.W.2d 871 (S.D. 2007).....                                                  | 8               |
| <i>United States v. Banks</i> ,<br>3 F.3d 399 (11th Cir. 1993).....                                          | 5               |
| <i>United States v. Berry</i> ,<br>90 F.3d 148 (6th Cir. 1996) .....                                         | 5, 7            |
| <i>United States v. Branch</i> ,<br>537 F.3d 328 (4th Cir. 2008) .....                                       | 5               |
| <i>United States v. Diaz</i> ,<br>25 F.3d 392 (6th Cir. 1994) .....                                          | 7               |
| <i>United States v. Grupee</i> ,<br>No. 11-1291, 2012 U.S. App. LEXIS 12600<br>(1st Cir. June 20, 2012)..... | 6               |

## TABLE OF AUTHORITIES—Continued

|                                                                              | Page |
|------------------------------------------------------------------------------|------|
| <i>United States v. Kennedy</i> ,<br>131 F.3d 1371 (10th Cir. 1997) .....    | 6    |
| <i>United States v. Kitchell</i> ,<br>653 F.3d 1206 (10th Cir. 2011) .....   | 5    |
| <i>United States v. Klein</i> ,<br>626 F.2d 22 (7th Cir. 1980) .....         | 7    |
| <i>United States v. Limares</i> ,<br>269 F.3d 794 (7th Cir. 2001) .....      | 7    |
| <i>United States v. Lingenfelter</i> ,<br>997 F.2d 632 (9th Cir. 1993) ..... | 5    |
| <i>United States v. Ludwig</i> ,<br>10 F.3d 1523 (10th Cir. 1993) .....      | 12   |
| <i>United States v. Meyer</i> ,<br>536 F.2d 963 (1st Cir. 1976) .....        | 10   |
| <i>United States v. Owens</i> ,<br>167 F.3d 739 (1st Cir. 1999) .....        | 5    |
| <i>United States v. Place</i> ,<br>462 U.S. 696 (1983) .....                 | 4, 5 |
| <i>United States v. Ross</i> ,<br>456 U.S. 798 (1982) .....                  | 4, 9 |
| <i>United States v. Sanchez-Pena</i> ,<br>336 F.3d 431 (5th Cir. 2003) ..... | 5, 6 |
| <i>United States v. Sundby</i> ,<br>186 F.3d 873 (8th Cir. 1999) .....       | 5, 6 |
| <i>United States v. Ventresca</i> ,<br>380 U.S. 102 (1965) .....             | 11   |

## TABLE OF AUTHORITIES—Continued

|                                                                                                                                                                                                                                                                                                                                                                                      | Page           |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| <i>United States v. Winters</i> ,<br>600 F.3d 963 (8th Cir. 2010) .....                                                                                                                                                                                                                                                                                                              | 6              |
| <i>Virginia v. Moore</i> ,<br>553 U.S. 164 (2008) .....                                                                                                                                                                                                                                                                                                                              | 2, 17          |
| <br>CONSTITUTION                                                                                                                                                                                                                                                                                                                                                                     |                |
| U.S. Const. amend. IV .....                                                                                                                                                                                                                                                                                                                                                          | 2, 3, 4, 5, 17 |
| <br>RULES                                                                                                                                                                                                                                                                                                                                                                            |                |
| SUP. CT. R. 37.4 .....                                                                                                                                                                                                                                                                                                                                                               | 1              |
| <br>OTHER AUTHORITIES                                                                                                                                                                                                                                                                                                                                                                |                |
| Central Florida High Intensity Drug Trafficking<br>Area: Drug Market Analysis 2011 at 1, 7,<br><i>available at</i> <a href="http://www.justice.gov/ndic/dmas/Central_Florida_DMA-2011(U).pdf">http://www.justice.gov/ndic/dmas/<br/>Central_Florida_DMA-2011(U).pdf</a> .....                                                                                                        | 14             |
| Christopher S. Wren, <i>Harnessing the Powerful<br/>Secrets of a Dog's Nose</i> , N.Y. Times, August 3,<br>1999, at 3, <i>available at</i> <a href="http://www.nytimes.com/1999/08/17/science/harnessing-the-powerful-secrets-of-a-dog-s-nose.html?src=pm">http://www.nytimes.<br/>com/1999/08/17/science/harnessing-the-powerful-<br/>secrets-of-a-dog-s-nose.html?src=pm</a> ..... | 11             |
| Florida Dep't of Highway Safety & Motor<br>Vehicles, Florida Highway Patrol, "K-9's Join<br>the Florida Highway Patrol," <i>available at</i><br><a href="http://www.flhsmv.gov/fhp/CIP/VIP1.htm">http://www.flhsmv.gov/fhp/CIP/VIP1.htm</a> .....                                                                                                                                    | 14             |
| Sir Walter Scott, <i>THE TALISMAN</i> 371 (1904), <i>available<br/>at</i> <a href="http://www.archive.org/stream/talismanwithintr00scotuoft#page/370/mode/2up">http://www.archive.org/stream/talismanwithin<br/>tr00scotuoft#page/370/mode/2up</a> .....                                                                                                                             | 12, 13         |

## TABLE OF AUTHORITIES—Continued

|                                                                                                                                                                                                                                                                                                                                                                                          | Page |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Substance Abuse and Mental Health Services Administration, State Estimates of Substance Use and Mental Disorders from the 2008-2009 National Surveys on Drug Use and Health, NSDUH Series H-40, HHS Publication No. (SMA) 11-4641, at 17, 60 (2011), <i>available at</i> <a href="http://www.oas.samhsa.gov/2k9/state/Cover.pdf">http://www.oas.samhsa.gov/2k9/state/Cover.pdf</a> ..... | 14   |
| U.S. Dep't of Justice, NIJ Guide 601-00, Guide for the Selection of Drug Detectors for Law Enforcement Applications 21-22 (2000) .....                                                                                                                                                                                                                                                   | 15   |
| U.S. Dep't of Justice, National Drug Intelligence Center, National Drug Threat Assessment 2011 at 8-10, <i>available at</i> <a href="http://www.justice.gov/ndic/pubs44/44849/44849p.pdf">http://www.justice.gov/ndic/pubs44/44849/44849p.pdf</a> .....                                                                                                                                  | 13   |
| Virginia State Police, Annual Report: 2010 Facts and Figures 46, <i>available at</i> <a href="http://www.vsp.state.va.us/Annual_Report.shtm">http://www.vsp.state.va.us/Annual_Report.shtm</a> .....                                                                                                                                                                                     | 15   |

## STATEMENT OF THE IDENTITY, INTEREST AND AUTHORITY OF AMICI TO FILE

The Commonwealth of Virginia and the States of Alabama, Arizona, Colorado, Delaware, Idaho, Illinois, Indiana, Kansas, Maine, Michigan, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Texas, Utah, Vermont, Washington, Wisconsin, the Commonwealth of Pennsylvania, the Commonwealth of Puerto Rico, and the Territory of Guam each have a vital state interest in combating the flow of illegal drugs, a problem of interstate (and international) proportions.<sup>1</sup> Drug-detecting canines are one of the essential weapons in the States' arsenal to combat this illegal traffic. As argued by petitioner, the Florida Supreme Court decision in *Harris v. State*, 71 So. 3d 756 (Fla. 2011), misinterprets this Court's precedents to draw into question, and thus practically prohibit, the long-standing practice of utilizing canines to detect the presence of illegal drugs. The *Harris* decision imposes an onerous burden of production to prove a foundation for acting on a canine's alert that unreasonably burdens law enforcement use of trained and certified drug-detection dogs. The burdens erroneously placed on Florida's efforts to interdict illegal drugs will be borne not only by the citizens and law enforcement officials in the State of Florida but also by the citizens and law enforcement officials throughout the States, imposing untold social harm. Accordingly, the Commonwealth of Virginia

---

<sup>1</sup> Consent of the parties is not required for the States to file an amicus brief. SUP. CT. R. 37.4.



and the other Amici States join in supporting the State of Florida's request that the decision of the Supreme Court of Florida be overruled and that a workable rule of decision be adopted, one that hews to this Court's principle that probable cause "deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)).

---

## SUMMARY OF ARGUMENT

As demonstrated in Florida's Opening Brief, the Florida Supreme Court's decision in *Harris v. State* "imposes an evidentiary burden on the state which is based on a misconception of the federal constitutional requirement for probable cause." See *Harris*, 71 So. 3d at 775 (Canady, C.J., dissenting). Evidence of a canine's training and certification provides "a substantial basis" on which an officer may act with probable cause to search the area alerted to, as it affords the officer reason to conclude that there is "a fair probability that contraband or evidence of a crime will be found in [that] particular place." *Gates*, 462 U.S. at 238-39 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)). And "[i]n determining what is reasonable under the Fourth Amendment," the Court should correct the Supreme Court of Florida's failure to "give [any, much less] great[,] weight to the 'essential interest in readily administrable rules,'" *Virginia v. Moore*, 553 U.S. 164, 175 (2008) (quoting

*Atwater v. Lago Vista*, 532 U.S. 318, 347 (2001)), and remove the unreasonable burden its decision places on long-standing law enforcement practices.

---

## ARGUMENT

### I. **HARRIS' HOLDING THAT LAW ENFORCEMENT MUST MAINTAIN AND PRODUCE EXTENSIVE TRAINING AND FIELD RECORDS BEFORE A TRAINED AND CERTIFIED DOG'S ALERT MAY SERVE AS THE PREDICATE FOR PROBABLE CAUSE TO SEARCH CONFLICTS WITH THE FIRST PRINCIPLES OF PROBABLE CAUSE.**

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” U.S. Const. amend. IV, a protection that ordinarily mandates that a warrant be obtained from a magistrate, unless an exception applies. See *Katz v. United States*, 389 U.S. 347, 357 (1967); accord *Arizona v. Gant*, 556 U.S. 332, 338 (2009). A lawful stop and the automobile exception to the warrant requirement typically justifies the search of a defendant’s vehicle for contraband if there is probable cause to believe that such contraband is present. See *Carroll v. United States*, 267 U.S. 132, 149 (1925) (holding that “if the search and seizure without a warrant *are made upon probable cause*, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an

automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid” (emphasis added)). And the alert by a trained and certified drug-detection dog upon the exterior of defendant’s vehicle grants the officer “probable cause to believe that the vehicle contains contraband.” *United States v. Ross*, 456 U.S. 798, 807-08, 825 (1982).

This Court has held that “the use of a well-trained narcotics-detection dog—one that ‘does not expose noncontraband items that otherwise would remain hidden from public view,’—during a lawful traffic stop, generally does not implicate legitimate privacy interests,” and thus that a dog sniff is not a search for purposes of the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)). As such, a dog sniff has been recognized as a “sui generis” tool for contraband investigation, *Place*, 462 U.S. at 707, as it “is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.” *Id.* Furthermore, the Court has held that “a positive result” of a dog’s sniff “would have resulted in [defendant’s] justifiable arrest on probable cause.” *Florida v. Royer*, 460 U.S. 491, 506 (1983). Yet the precise question presented here, whether an alert by a dog trained and certified to detect drugs affords the officer “probable cause to believe that the vehicle contains contraband” has not been answered by this Court. *Ross*, 456 U.S. at 807-08.

The Courts of Appeals are in unanimity that a trained drug-detection “dog’s positive indication alone

is enough to establish probable cause for the presence of a controlled substance if the dog is reliable.” *United States v. Sundby*, 186 F.3d 873, 876 (8th Cir. 1999) (citing *United States v. Owens*, 167 F.3d 739, 749 (1st Cir. 1999)); see, e.g., *United States v. Kitchell*, 653 F.3d 1206, 1223 (10th Cir. 2011); *United States v. Branch*, 537 F.3d 328, 340 n.2 (4th Cir. 2008); *United States v. Sanchez-Pena*, 336 F.3d 431, 444 (5th Cir. 2003); *United States v. Berry*, 90 F.3d 148, 153 (6th Cir. 1996); *United States v. Lingenfelter*, 997 F.2d 632, 639 (9th Cir. 1993). Precisely what must be shown to establish reliability remains the subject of some disagreement. Seizing on *Caballes*’ use of the adverb “well” and its explanation for why the sniff of a “well-trained narcotics-detection dogs” is not a search—because it “‘does not expose noncontraband items that otherwise would remain hidden from public view,’” *Caballes*, 543 U.S. at 409 (quoting *Place*, 462 U.S. at 707), the Florida Supreme Court in *Harris* had made the training and performance of each drug-detection dog a recurring evidentiary matter of constitutional dimensions. See *Harris*, 71 So.3d at 771. That approach misconstrues the first principles of this Court’s Fourth Amendment jurisprudence, imposes pointless burdens on drug interdiction through the use of drug-detection dogs, and promises a never-ending stream of evidentiary hearings that cannot help but reach conflicting results.

Quite simply, “probable cause arises when a drug-trained canine alerts to drugs.” *United States v. Banks*, 3 F.3d 399, 402 (11th Cir. 1993). Amici States

urge this Court to adopt the majority view that evidence of training and certification is sufficient to establish the dog's reliability, without extended expositions of a dog's experience and without proffering training and field performance records. *See, e.g., United States v. Grupee*, No. 11-1291, 2012 U.S. App. LEXIS 12600, at \*8 (1st Cir. June 20, 2012), (Souter, J.) (holding that an affidavit reciting only that a state police drug-detection dog alerted on the exterior of a vehicle provided the "magistrate with a substantial basis to find probable cause for the car search," although there was no statement "about the State Police's standards for training drug-sniffing dogs or about the particular dog's success and error rate"); *United States v. Winters*, 600 F.3d 963, 967 (8th Cir. 2010) ("A drug-detection dog is considered reliable when it has been trained and certified to detect drugs" (internal quotation marks omitted)); *Sanchez-Pena*, 336 F.3d at 444, n.62 (stating that "evidence that the dog was certified was sufficient proof of his training to make an effective alert" to establish probable cause and stating that courts should not, even where the dog's reliability is challenged, "take up whether the dog's training was sufficient"); *Sundby*, 186 F.3d at 876 (holding that statements that "the dog has been trained and certified to detect drugs" that did "not give a detailed account of the dog's track record or education" was sufficient to establish probable cause); *United States v. Kennedy*, 131 F.3d 1371, 1377 (10th Cir. 1997). ("We decline to encumber the affidavit process by requiring affiants to include a complete history of a



drug dog's reliability beyond the statement that the dog has been trained and certified to detect drugs."); *Berry*, 90 F.3d at 153 ("[T]o establish probable cause, the affidavit need not describe the particulars of the dog's training. Instead, the affidavit's accounting of the dog sniff indicating the presence of controlled substances and its reference to the dog's training in narcotics investigations was sufficient to establish the dog's training and reliability."); *United States v. Diaz*, 25 F.3d 392, 396 (6th Cir. 1994) (holding "that testimony is sufficient to establish a dog's reliability in order to support a valid sniff," and that reliability need not be proven "with training and performance records"); *United States v. Klein*, 626 F.2d 22, 27 (7th Cir. 1980) (holding that statements that a "dog 'graduated from a training class in drug detection'" and "'has proven reliable in detecting drugs and narcotics on prior occasions'" were sufficient evidence to establish probable cause); *Jones v. Commonwealth*, 670 S.E.2d 727, 733 (Va. 2009) (rejecting any requirement for "specific certifications [or] the results of field testing" to establish a drug-detection dog's reliability). This position properly limits the inquiry to matters readily amenable to judicial evaluation, and avoids litigating again and again both the science demonstrating dogs' vastly superior sense of smell, as well as a particular dog's training and field performance.<sup>2</sup>

---

<sup>2</sup> The Court in *Harris* joined a conflicting line of cases centered mostly in state court. See *United States v. Limares*, 269 (Continued on following page)



This approach is also most consistent with the recognition that whether there exists “‘probable cause’ to believe that contraband or evidence is located in a particular place” is a “commonsense, practical question,” *Gates*, 462 U.S. at 230, which considers the “totality-of-the-circumstances” and, “‘as the very name implies, . . . deal[s] with probabilities.’” *Id.* at 231 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). Contrary to the

---

F.3d 794, 798 (7th Cir. 2001) (holding that testimony to establish reliability “need not describe training methods or give the dogs’ scores on their final exams,” and that “[i]t is enough if a dog is reliable in the field” as testified to by the dog’s handlers and proven by an “evidentiary hearing” that showed that the dog “ha[d] been right 62% of the time, enough to prevail on a preponderance of the evidence, and ‘probable cause’ is something less than a preponderance”); see also, *State v. Foster*, 252 P.3d 292, 298 (Or. 2011) (“[I]n assessing whether the alert gave rise to probable cause, a court must consider the totality of the circumstances known to the officers, which typically will include such things as the dog’s training, certification, continued training and recertification, and performance in the field.”); *State v. Nguyen*, 726 N.W.2d 871, 877 (S.D. 2007) (“[T]rial courts making drug dog reliability determinations may consider a variety of elements, including such matters as the dog’s training and certification, its successes and failures in the field, and the experience and training of the officer handling the dog. Under the totality of circumstances, the court can then weigh each of these factors.”); *England v. State*, 19 S.W.3d 762, 768-69 (Tenn. 2000) (“the trial court, in making the reliability determination may consider such factors as: the canine’s training and the canine’s “track record,” with emphasis on the amount of false negatives and false positives the dog has furnished. The trial court should also consider the officer’s training and experience with this particular canine.” (emphasis added)).

understanding in *Harris*, “probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.” *Gates*, 462 U.S. at 232. The appropriate inquiry is thus whether the alert of the trained and certified drug-detection dog, viewed objectively, allowed the officer to reasonably believe that “that contraband or evidence of a crime will be found in [the defendant’s vehicle].” *Gates*, 462 U.S. at 238-39; see *Ross*, 456 U.S. at 808 (holding that an officer’s “probable-cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate”).

Eschewing this common-sense approach and expressing no reservations regarding the limits of judicial expertise, the *Harris* Court held that trained and certified drug-detection dogs are not reliable enough to provide an officer probable cause to search when they alert, unless the State keeps and produces extensive evidence of each dog’s reliability. The Florida Supreme Court observed that “[b]ecause a dog cannot be cross-examined like a police officer,” in determining whether an officer enjoyed probable cause as a result of the “trained and certified” drug-detection dog alerting, it is the State’s burden to show under a “totality of the circumstances” analysis “that the officer had a reasonable basis for believing the dog to be reliable” before conducting the search. 71 So. 3d at 758-59. The court concluded that this was necessary because the Fourth Amendment places

“the burden . . . on the State to establish probable cause for a warrantless search.” *Id.* at 759. In each case,

the State must present the training and certification records, an explanation of the meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog’s reliability in being able to detect the presence of illegal substances within the vehicle.

*Id.* In reaching this conclusion, the Florida Supreme Court analogized the case to “situations where probable cause to search is based on the information provided by informants,” and opined that this tutorial was necessary to allow the trial court “to make an adequate determination as to the dog’s reliability.” 71 So. 3d at 759, 767, 771-72.

Contrary to the approach adopted in *Harris*, a trained and certified drug-detection dog’s alert provides an officer probable cause, *without more*. Just as a “canine sniff” by a “well-trained narcotics-detection dog” is not like a search by police officers, see *Caballes*, 543 U.S. at 409, a dog’s alert is not like a statement by a criminal informant. Dogs, unlike humans, do not prevaricate. See *United States v. Meyer*, 536 F.2d 963, 966 (1st Cir. 1976) (noting that “a canine, when trained, reacts mechanically to

certain cues in his environment,” and thus that “[t]he same concerns that would be present in a human informant are simply not relevant here”). Rather, a trained dog’s sense of smell is akin to a proven technology, say a speed detecting radar gun, as dogs possess a sense of smell exponentially more powerful, and discriminating, than humans. See Christopher S. Wren, *Harnessing the Powerful Secrets of a Dog’s Nose*, N.Y. Times, Aug. 3, 1999, <http://www.nytimes.com/1999/08/17/science/harnessing-the-powerful-secrets-of-a-dog-s-nose.html?src=pm> (noting that trained dog’s drug-detection accuracy rates far out-stripped that of electronic drug detectors). Proof that a dog has been trained and certified to detect drugs, like proof that a radar gun has been recently calibrated, provides sufficient evidence of reliability to justify investigatory action by an officer. For once a drug-detection dog has alerted on an area, the handling officer necessarily possesses a “‘substantial basis’” for concluding that there is a “fair probability that contraband or evidence of a crime will be found.” *Gates*, 462 U.S. at 238-39 (quoting *Jones*, 362 U.S. at 271).

If the courts are to credit, as they often do, the trained senses of police officers—officers “engaged in the often competitive enterprise of ferreting out crime,” *Arizona v. Evans*, 514 U.S. 1, 15 (1995)—to establish probable cause and act upon it, see, e.g., *United States v. Ventresca*, 380 U.S. 102, 111 (1965) (“A qualified officer’s detection of the smell of [evidence of crime] has often been held a very

strong factor in determining that probable cause exists so as to allow issuance of a warrant.”), courts should be even more willing to credit the senses of trained and certified drug-detection dogs who can have no corrupt interest. See Sir Walter Scott, *THE TALISMAN* 371 (1904), available at <http://www.archive.org/stream/talismanwithintr00scotuoft#page/370/mode/2up> (“[R]ecollect that the Almighty, who gave the dog to be companion of our pleasures and our toils, hath invested him with a nature noble and incapable of deceit. . . . He hath a share of man’s intelligence, but no share of man’s falsehood.”); see also *United States v. Ludwig*, 10 F.3d 1523, 1527 (10th Cir. 1993) (holding that a “dog alert usually is at least as reliable as many other sources of probable cause and is certainly reliable enough to create a ‘fair probability’ that there is contraband”).

## **II. THE HARRIS STANDARD PROMISES CONFLICTING RESULTS THAT WILL FRUSTRATE THE TIME-HONORED AND VITAL ROLE OF DOGS AS INVESTIGATORY TOOLS.**

Because the use of dogs as investigative tools is older than the existence of professional police forces, “[t]he courts are not strangers to the use of trained dogs to detect the presence of controlled substances.” *Royer*, 460 U.S. at 505; see also, *Ludwig*, 10 F.3d at 1528 (stating “that bloodhound evidence ‘was looked upon with favor as early as the twelfth century’ and relating the declaration of Richard I of England,



originally taken from Sir Walter Scott's *THE TALISMAN*: 'Dress yonder Marquis [who had stolen the banner of England] in what peacock robes you will, disguise his appearance, alter his complexion with drugs and washes, hide himself amidst a hundred men; I will yet pawn my scepter that the hound detects him'" (quoting *Blair v. Commonwealth*, 204 S.W. 67, 68 (Ky. 1918))). This long-standing and widespread law enforcement practice, especially in the interdiction of illicit drugs, calls for readily administrable rules and judicial sensitivity to pressing social realities.

Florida, a populous state situated in southeasternmost portion of the United States and a hub for international travel, trade, and tourism, serves as an involuntary host of much parasitic drug trafficking activity. See U.S. Dep't of Justice, National Drug Intelligence Center, National Drug Threat Assessment 2011 at 8-10, *available at* <http://www.justice.gov/ndic/pubs44/44849/44849p.pdf> (noting that Florida is "first in the nation for the number of indoor cannabis grow sites seized . . . and second for the number of cannabis plants eradicated" and stating that Florida is a primary point of entry for many international drug smuggling operations). Nationally, drug use, and the attendant trafficking of drugs, has become a prevalent and permanent social problem, with surveys reporting in 2008-2009 that more than eight percent of the U.S. population aged 12 or older had used an illicit drug in the month preceding the survey, and that approximately 2 percent of persons



aged 12 or older were addicted to illicit drugs. Substance Abuse and Mental Health Services Administration, State Estimates of Substance Use and Mental Disorders from the 2008-2009 National Surveys on Drug Use and Health, NSDUH Series H-40, HHS Publication No. (SMA) 11-4641, at 17, 60 (2011), *available at* <http://www.oas.samhsa.gov/2k9state/Cover.pdf>. The human misery resulting from this traffic and use eludes quantification, but is readily apparent. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000) (“There is no doubt that traffic in illegal narcotics creates social harms of the first magnitude.”)

To combat the flow of illegal drugs, the Florida State Highway Patrol, like the law enforcement agencies in many other states, has long deployed contraband interdiction teams, now numbering 26, each of which utilize canines. Florida Dep’t of Highway Safety & Motor Vehicles, Florida Highway Patrol, “K-9’s Join the Florida Highway Patrol,” *available at* <http://www.flhsmv.gov/fhp/CIP/VIP1.htm> (stating that “[t]he primary use of these units is the detection of illegal drugs”). In the five years preceding 2004, Florida Highway Patrol’s canine teams “seized over \$18.5 million of illegal drugs and other contraband, resulting in 6,089 criminal cases with 12,987 arrests.” *Id.* These efforts reduce the flow of illegal drugs, such as cocaine and methamphetamine, from Florida to other parts of the United States, including Amici States. *See* Central Florida High Intensity Drug Trafficking Area: Drug Market

Analysis 2011 at 1, 7, *available at* [http://www.justice.gov/ndic/dmas/Central\\_Florida\\_DMA-2011\(U\).pdf](http://www.justice.gov/ndic/dmas/Central_Florida_DMA-2011(U).pdf).

Like law enforcement officials in Florida, the Amici States utilize canines to detect and interdict illicit drugs. This use results in a substantial number of seizures and arrests. For example, in 2010 alone, the Virginia State Police, which has 18 narcotic canine teams, utilized canine teams in response to 718 calls, resulting in 118 arrests and 127 drug seizures. *See* Virginia State Police, Annual Report: 2010 Facts and Figures 46, *available at* [http://www.vsp.state.va.us/Annual\\_Report.shtm](http://www.vsp.state.va.us/Annual_Report.shtm). Furthermore, as of 2000, U.S. Customs Service alone employed over 600 canine teams, which in a single year made over 9,000 seizures of drugs valued in excess of 3 billion dollars. U.S. Dep't of Justice, NIJ Guide 601-00, Guide for the Selection of Drug Detectors for Law Enforcement Applications 21-22 (2000). As substantial as these numbers are, they represent only the tip of the proverbial iceberg, as they do not include the activities of all states, nor that of their local police and sheriff departments, many of whom have their own canine teams.

The Florida Supreme Court's decision in *Harris* undermines these vital law enforcement activities by placing substantial administrative burdens on the use of canines. As the Florida Supreme Court would have it, law enforcement, before availing itself of the benefit of a trained and certified drug-detection dog, must consider whether it can make dog-specific evidentiary showings in order to introduce whatever

evidence the dog's nose might point up. As *Harris* candidly recites, "[t]he State's presentation of evidence that the dog is properly trained and certified is the beginning of the analysis." 71 So. 3d at 771. After that

the State must explain the training and certification so that the trial court can evaluate how well the dog is trained and whether the dog falsely alerts in training (and, if so, the percentage of false alerts). Further, the State should keep and present records of the dog's performance in the field, including the dog's successes (alerts where contraband that the dog was trained to detect was found) and failures ("unverified" alerts where no contraband that the dog was trained to detect was found). The State then has the opportunity to present evidence explaining the significance of any unverified alerts, as well as the dog's ability to detect or distinguish residual odors. Finally, the State must present evidence of the experience and training of the officer handling the dog. Under a totality of the circumstances analysis, the court can then consider all of the presented evidence and evaluate the dog's reliability.

*Id.* By making the determination of probable cause dependent upon such an array of factors, with no clear guidance as to how much evidence of reliability is enough to justify an officer in searching in response to a drug-detection dog's alert, the Florida Supreme Court forgets that probable cause "is a practical,

nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Pringle*, 540 U.S. at 370 (quoting *Gates*, 462 U.S. at 231). If law enforcement cannot deploy a drug-detection dog without such continuing record keeping, it may well conclude that the burden is too great.

This regime could only be overcome, if at all, through the disproportionate expenditure of limited law enforcement and judicial resources. Because of this, the Court "[i]n determining what is reasonable under the Fourth Amendment, [should] give[] great weight to the 'essential interest in readily administrable rules.'" *Moore*, 553 U.S. at 175 (quoting *Atwater*, 532 U.S. at 347). That the decision in *Harris* is bereft of this virtue, is readily seen by the questions it leaves unanswered: what constitutes a "false alert";<sup>3</sup> do residual odors count as false alerts; what percentage of false alerts is "too many"; how long must records be kept; if records are destroyed, may the dog still be placed in the field; assuming records of past success and failure rates do not exist,

---

<sup>3</sup> The term "false alert" may better be termed a "non-productive final response." Although a dog's alert may not uncover contraband, the site on which the dog alerted often can be shown to have previously held contraband, retaining trace amounts. Thus, a drug-detection dog may correctly alert at the presence of contraband, but the subsequent search reveal no amount for which a suspect could be charged. In any case, such an alert affords an officer the requisite probable cause.

are experienced dogs “grandfathered in” on the basis of their past work; whether the alert of a “rookie” dog—one who has not previously been in the field—could provide probable cause; and finally, whether a positive alert deemed unreliable in one case may be used to establish in the future that the dog is *now* demonstrably reliable. The potential for varied and inconsistent applications also raises serious questions regarding whether the “deterrent effect” outweighs the proportional “harm to the justice system.” See *Herring v. United States*, 555 U.S. 135, 147-48 (2008); see also *Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011) (rejecting a test to evaluate whether probable cause existed on the ground that it would create “an unacceptable degree of unpredictability” for both law enforcement officers deciding whether to engage in a search as well as for judges who would have to apply it after the fact). Amici States believe that the interests of justice are best served by crediting as reliable trained and certified drug-detection dogs without more.

---

## CONCLUSION

The decision of the Florida Supreme Court should be reversed and the common-sense rule that an alert by a trained and certified drug-detection dog provides a substantial basis for concluding that

contraband may be found in the alerted to area be established as constitutionally sufficient.

Respectfully submitted,

KENNETH T. CUCCINELLI, II  
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.  
Solicitor General of Virginia  
dgetchell@oag.state.va.us  
*Counsel of Record*

MICHAEL H. BRADY  
Assistant Attorney General  
mbrady@oag.state.va.us

CHARLES E. JAMES, JR.  
Chief Deputy  
Attorney General

WESLEY G. RUSSELL, JR.  
Deputy Attorney General  
wrussell@oag.state.va.us

OFFICE OF THE  
ATTORNEY GENERAL  
900 East Main Street  
Richmond, Virginia 23219  
Telephone: (804) 786-7240  
Facsimile: (804) 371-0200

June 29, 2012

*Counsel for the  
Commonwealth of Virginia*